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SW 2023-010034

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CLERK OF THE SUPERIOR COURT
FILED

08-31-2023 3:45 p.m.
B. Navarro, Deputy



To: Office of the Arizona Attorney General
From: States United Democracy Center
Date: July 25, 2023
Re: Arizona False Electors Scheme Memo

I. INTRODUCTION

After losing the 2020 election, former President Donald Trump and his allies launched a complex and unlawful plan to overturn the election results in certain states, including Arizona, with the goal of preventing Joe Biden from being declared the winner of the presidential election. The plan included perpetuating, even before Election Day, the “big lie” that the only way that Trump could lose is if the election were “stolen”; filing frivolous post-election lawsuits; pressuring officials in seven battleground states to delay or stop certification of election results; urging state legislatures to declare a “failed” election, to order a complete “audit” of all votes, and to appoint their own slate of (Republican) electors; and finally, disrupting the January 6, 2021, Joint Session of Congress and pressuring then-Vice President Mike Pence to reject legitimate slates of (Democratic) electors from those battleground states, including Arizona.

A critical part of this effort involved organizing “alternate” slates of Trump electors to cast fake electoral votes in seven states which Biden had won (Arizona, Georgia, Nevada, New Mexico, Michigan, Pennsylvania, and Wisconsin). This came to be known as the “fake elector” scheme. The existence of these fake electoral votes was an essential premise for the argument by Trump lawyer John Eastman that Pence had the unilateral authority to reject or delay the counting of the legitimate electoral slates at the January 6 Joint Session, where electoral votes were to be counted and the election was to be certified and declared for the actual winner, Biden. Alternatively, a core group of national and state figures attempted to use the fake slates of electors to urge members of Congress to object to the legitimate Biden electors and to pressure legislatures in those seven states to certify their electoral votes for Trump, even though he had lost, potentially disenfranchising millions of voters. Fortunately, these efforts failed.

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In Arizona, at the end of November 2020 and in accordance with the state's election results, Arizona's then-Governor, Doug Ducey, signed a Certificate of Ascertainment¹ for the Biden electors. In the days and weeks after, the fake elector scheme played out in Arizona much like it did in other states: a group of individuals who purported to be the "duly elected" presidential electors met in Phoenix and cast fake electoral votes for Trump and Pence by signing fake certificates of electoral votes and mailing them to the Archivist of the United States and the President of the Senate.

Publicly released emails and text messages between organizers of the scheme provide critical insight into how the plan unfolded in Arizona.² The fake elector scheme originated with high-level Trump campaign advisers and staff, who organized the actors in individual states including Arizona. Those advisers and staff included Trump's attorneys Rudolph Giuliani and Boris Epshteyn, as well as outside legal advisors Kenneth Chesebro and John Eastman. By early December, the Trump campaign had decided to pursue this scheme. Chesebro and others were dedicated to making it happen. They worked actively to bring a set of key players in Arizona into their scheme, including the then-Chair of the Arizona Republican Party, Kelli Ward; the then-Executive Director of the Arizona Republican Party, Greg Safsten; and a lawyer for the Arizona Republican Party, John "Jack" Wilenchik. In email and text message communications, the organizers made clear that the purpose of the scheme was to submit fake certificates of votes from false electors in order to obstruct the congressional proceeding on January 6, at which Biden would otherwise be declared President after a count of the electoral votes.³ Chesebro played a pivotal role, providing a roadmap and a certificate template to the false electors.⁴ He and other Trump advisers regularly updated White House Chief of Staff Mark Meadows and Giuliani on their plans and progress. Eastman also pressured Pence and the then-Chair of the Republican National Committee, Ronna McDaniel, to assist in the scheme.⁵ On December 14, the Arizona

¹ In presidential elections, there are at least four relevant "certificates." The first is the certification of the election results by the state entity in charge of elections. In Arizona, the Secretary of State canvasses and certifies statewide elections. The second is the Certificate of Ascertainment sent by the state's governor (usually) to the Archivist of the United States attesting to the names of the state's duly elected Electoral College members. *See* 3 U.S.C. § 6 (2020). The third is a Certificate of Votes sent by the electors after they meet. *See* 3 U.S.C. § 7-11 (2020). In 2020, the federal law governing the Electoral College also had a fourth relevant certificate—a Certificate of Final Ascertainment—issued by a governor after final resolution of all controversies or contests in the state regarding the presidential election. 3 U.S.C. § 6 (2020). The second and third certificates are necessary for Congress when it meets to count the votes on January 6.

² Maggie Haberman & Luke Broadwater, 'Kind of Wild/Creative': Emails Shed Light on Trump Fake Electors Plan, *THE NEW YORK TIMES* (July 26, 2022),

<https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html>.

³ *Id.*

⁴ Email from Kenneth Chesebro to Greg Safsten (Dec. 11, 2020, 3:37 AM UTC), available at <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000918596/pdf/GPO-J6-DOC-CTRL0000918596.pdf>, [hereinafter, Email from Chesebro to Safsten, Dec. 11, 2020].

⁵ *Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol*, H.R. Rep. No. 117-663 at 346, 356 (2022), available at <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>, [hereinafter, Jan. 6th Comm. Report].

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false electors met and signed the fake certificates of votes.⁶ On that same day, the true electors from the Democratic Party met a few miles away and signed the bona fide certificates.

Not only did the fake electoral votes have no legal basis, but the actions of the false electors and those who conspired to devise and execute the scheme as part of the larger plan to overturn the election were potentially criminal. Because the participants in the scheme may have had different levels of involvement and intent, and thus may have differing levels of culpability, we found it helpful to group the participants into different categories based on available evidence pointing to their potential culpability. Category 1 includes people who directly organized or participated in the scheme in Arizona. Based on publicly available evidence, Category 1 consists of: (a) in-state organizers, including Wilenchik, Greg Safsten, and Kelli Ward; (b) out-of-state organizers, including Chesebro, Giuliani, and Thomas Lane; and (c) participants, including all the false electors. The publicly available evidence already reveals the roles played by these individuals, although further investigation may elaborate on certain facts. Category 2 includes individuals who had some contact with organizers or false electors in Arizona, but more evidence is needed to establish the extent of their involvement. Category 2 includes individuals such as Eastman, Epshteyn, and Meadows. Category 3 includes individuals who may have been involved in the scheme, such Cleta Mitchell (an outside attorney who advised the Trump campaign), Ronna McDaniel, and Trump himself.

This memo details important facts about the Arizona scheme and the false electors based on publicly available information and analyzes potential criminal violations committed by the false electors and others involved in the scheme. Finally, this memo discusses potential defenses these individuals may assert.

II. FACTS

A. Procedures for Statewide Election Certification

In Arizona, the initial canvass of an election—the tallying of the election returns—occurs at the county level. Each county is governed by a Board of Supervisors (“BoS”) that is responsible for conducting the canvass. For a general election that canvass must be completed within six to twenty days after election day.⁷ The BoS must then transmit the official canvass to the Arizona Secretary of State (“SoS”).⁸

⁶ Arizona Republican Party, (@azgop), TWITTER (Dec. 14, 2020, 2:42 PM), <https://twitter.com/AZGOP/status/1338600278459727872?s=20>.

⁷ A.R.S. § 16-642 (A).

⁸ A.R.S. § 16-646 (B).

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“On the fourth Monday following a general election,” the SoS must conduct the statewide canvass in the presence of the Governor and Attorney General.⁹ The SoS then must declare that the candidate for each office who received the highest number of votes is “elected” and issue a Certificate of Election to that candidate.¹⁰ For a presidential election, the Certificate of Election is issued to the designated electors for the candidate who received the highest number of votes, as discussed in detail below.¹¹ In 2020, the statewide canvass was conducted on November 30.

B. Procedures for Appointment of Presidential Electors

Federal and state law prescribe procedures for the designation of presidential electors. Pursuant to federal law, each state is allocated a certain number of presidential electors “equal to the number of Senators and Representatives” for that state at the time of a presidential election.¹² The Constitution assigns responsibility to the states to prescribe the process for selecting presidential electors.¹³ In Arizona, each presidential candidate’s putative eleven electors are designated pursuant to a state statute. Within ten days after the primary election, “[t]he chairman of the state committee of a political party that is qualified for representation on an official party ballot at the primary election and accorded a column on the general election ballot shall appoint candidates for the office of presidential elector” and file a nomination paper with the SoS.¹⁴ In a presidential election, when individuals cast their votes for a candidate, they are effectively electing the slate of electors from the corresponding political party.¹⁵ In Arizona, the names of the presidential electors for each presidential candidate are printed on the official ballot next to the name of the candidate.¹⁶

As previously discussed, according to Arizona law, the SoS must issue a Certificate of Election to each candidate who received the highest number of votes.¹⁷ For a presidential election, that Certificate of Election is issued to the electors for the candidate who received the most votes.¹⁸ While federal law does not require that electors cast their votes in accordance with the winner of the popular vote in their state, Arizona state law requires them to do so. In 2017, Arizona passed a “faithless elector” law mandating that individuals who serve as presidential electors must cast their electoral votes for the presidential and vice presidential candidates who “jointly received the highest number of votes.”¹⁹ The statute also provides for the removal and replacement of

⁹ A.R.S. § 16-648 (A).

¹⁰ Ariz. Const. Art 7 § 7; A.R.S. § 16-650.

¹¹ See A.R.S. § 16-650; see also A.R.S. § 16-344.

¹² 3 U.S.C § 3 (2020).

¹³ 3 U.S.C § 1 (2020).

¹⁴ A.R.S. § 16-344.

¹⁵ A.R.S. § 16-212 (A).

¹⁶ A.R.S. § 16-502 (C)(1).

¹⁷ A.R.S. § 16-650.

¹⁸ A.R.S. § 16-212 (A).

¹⁹ A.R.S. § 16-212 (B).

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a presidential elector who refuses to cast their electoral vote for the presidential ticket that received the highest number of votes.²⁰ Prior to the passage of the faithless elector law, the unbroken and consistent pattern in Arizona was for electors whose candidate received the greatest number of votes to cast their electoral votes for that candidate.²¹ The electors have no authority to deviate from the election results.²²

Under federal law, the executive²³ of each state must sign a “Certificate of Ascertainment” declaring that the individuals who received the highest number of votes are the duly elected presidential electors.²⁴ The Certificate of Ascertainment must have the state seal affixed to it, and the governor must mail that certificate to the Archivist of the United States.²⁵ As discussed below, the presidential electors must then meet on the date designated by federal law for that election year and officially cast their electoral votes for the candidate whom they represent. The SoS has historically presided over the meeting of the electors where the electoral votes are officially cast. And the SoS has historically signed the “Presidential Elector Ballot” as a witness.²⁶ Moreover, the SoS typically provides administrative assistance to the electors in complying with the relevant provisions of the Electoral Count Act (“ECA”). See 3 U.S.C. § 7-11 (2020).

Federal law also prescribes procedures for determining the validity of electoral slates and the date that electors from each state are required to meet to cast their votes. First, the ECA²⁷ provides a “safe harbor” mechanism to create a “conclusive” set of electors.²⁸ Under 3 U.S.C. § 5, as it was in place in 2020, if a state had enacted laws before Election

²⁰ A.R.S. § 16-212 (C).

²¹ See Arizona Secretary of State, *Historical Election Results & Information*, <https://azsos.gov/elections/results-data/voter-registration-statistics/historical-election-results-information> (last visited July 14, 2023); see also, *Arizona Elections Procedures Manual* (Dec. 2019), at 128, https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (“As a prerequisite to placement of their nominees on the general election ballot, each recognized political party must timely submit the names of presidential electors who will cast votes for the winning candidate in the Electoral College.”).

²² *Bowyer v. Ducey*, 506 F. Supp. 3d 699, at 710 (D. Ariz. 2020) (“Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the duties imposed by the statute.”); A.R.S. § 16-212 (C).

²³ The Electoral Count Act places the duty to send a Certificate of Ascertainment on the state’s executive. In Arizona, historically, the Certificates of Ascertainment have been sent by the governor. Going forward in this memorandum, we will refer to the governor as having this responsibility.

²⁴ 3 U.S.C. § 6 (2020); Nat’l. Archives and Records Admin., *The 2020 Presidential Election/ Provisions of the Constitution and U.S. Code* (July 2020), <https://www.archives.gov/files/electoral-college/state-officials/presidential-election-brochure.pdf>, at 2, 5-6, [hereinafter, Nat’l. Archives, *2020 Presidential Election*].

²⁵ *Id.* at 4.

²⁶ Governor Katie Hobbs, FACEBOOK LIVE, <https://www.facebook.com/SecretaryHobbs/videos/2020-electoral-college/420122549030605/> (last visited July 14, 2023).

²⁷ In 2022, Congress revised the law governing the appointment of electors and the process for resolving disputes regarding their validity. This memorandum describes the provisions in effect in 2020.

²⁸ The ECA does not use the term “safe harbor,” but the shorthand is widely used. As a result of the 2022 revisions, the “safe harbor” mechanism no longer exists.

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Day for determining any “controversy or contest” regarding the presidential election—and if those rules lead to a “final determination” at least six days before the meeting of the Electoral College (the “safe harbor deadline”)—that final determination “shall be conclusive . . . so far as the ascertainment of the electors appointed by such State is concerned.”²⁹ In 2020, the safe harbor deadline was December 8th, and electors from each state—collectively members of the Electoral College—were required to meet and officially cast their electoral votes on December 14th.³⁰

C. The 2020 Presidential Election in Arizona

During the early voting period and on election day, November 3, 2020, a record number of Arizona voters cast their ballots.³¹ By November 23, 2020, the SoS had received the results of each county’s official canvass of the 2020 presidential election.³² On November 30, 2020, the then-Secretary of State, Katie Hobbs, completed the statewide canvass in a public meeting with then-Governor Doug Ducey, then-Attorney General Mark Brnovich, and Chief Justice of the Arizona Supreme Court Robert Brutinel present and officially confirmed that Biden had received 10,457 more votes than Trump.³³ On the same day, then-Governor Ducey signed the Certificate of Ascertainment declaring that the Democratic Party Presidential Electors “received the highest number of votes cast for any candidate for this office,” and were the “duly elected Presidential Electors.”³⁴

Also on that same day, November 30, 2020, Kelli Ward filed a lawsuit in Maricopa County Superior Court against the Biden Electors challenging the results of the presidential election.³⁵ In her original petition, Ward asserted claims under three

²⁹ 3 U.S.C. § 5 (2020).

³⁰ 3 U.S.C. § 7 (2020); Nat’l. Archives, *2020 Presidential Election*, at 4.

³¹ Arizona Secretary of State, *Voter Registration Statistics*, <https://azsos.gov/elections/results-data/voter-registration-statistics> (last visited July 5, 2023); Arizona Secretary of State, *2020 Election Information*, <https://azsos.gov/2020-election-information> (last visited July 10, 2023).

³² Arizona Secretary of State, *2020 General Election County Canvass Returns*, <https://azsos.gov/2020-general-election-county-canvass-returns> (last visited July 13, 2023).

³³ *Id.*; see also C-SPAN, *Arizona 2020 Election Results Certification* (Nov. 30, 2020), <https://www.c-span.org/video/?478418-1/arizona-2020-election-results-certification>.; see also Jerod Macdonald-Evoy, *Arizona certifies 2020 general election results*, *AZ Mirror* (Nov. 30, 2020), <https://www.azmirror.com/2020/11/30/arizona-certifies-2020-general-election-results/>.

³⁴ *Arizona Certificate of Ascertainment 2020* (Nov. 3, 2020), <https://www.archives.gov/files/ascertainment-arizona.pdf>; Note, Governor Ducey sent the National Archives two additional documents entitled “Certificate of Final Determination of Presidential Electors” on January 4, 2021, and January 6, 2021, updating the Archives on the final disposition of two election contests that ultimately upheld the election results. The additional documents did not alter, replace, or nullify the original Certificate of Ascertainment that was signed on November 30th.

³⁵ Note, Kelli Ward filed a preliminary discovery petition under a rule that allows discovery prior to filing a lawsuit when necessary to “prevent a failure or delay of justice.” *Ariz. R. Civ. P. § 27*; *Ward v. Jackson*, Maricopa Cnty. Super. Ct., No. CV2020-015285, Statement of Elections Contest pursuant to A.R.S. § 16-673 (Nov. 30, 2020), available at <https://www.democracydocket.com/wp-content/uploads/2020/11/11->

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statutory provisions, alleging that (1) Maricopa County election workers engaged in misconduct; (2) illegal votes had been counted; and (3) by reason of erroneous count of votes the person declared elected did not in fact receive the highest number of votes for the office.³⁶ Specifically, Ward claimed that the signature verification process for mail-in ballots in Maricopa County (by far the state's most populous county and one that Biden won) was not conducted according to state law³⁷ and that bipartisan observers were not allowed to fully observe the signature verification process.³⁸ She also claimed errors with regard to ballot duplication in Maricopa County. When a ballot is too damaged or illegible to be read by a tabulation machine, Arizona law provides a process by which a ballot can be duplicated and counted.³⁹ Ward alleged that observers were not allowed to observe part of the ballot duplication process and that there was an unusually high number of duplicate ballots in a particular congressional district.⁴⁰ Ward argued that due to the alleged misconduct of election officials, the election results were "fundamentally uncertain."⁴¹

The trial court held an "accelerated evidentiary hearing on December 3 and 4, 2020."⁴² On December 4, 2020, the court ruled that Ward had not presented sufficient evidence to show fraud or misconduct and confirmed the election results.⁴³ The court noted that it had allowed Ward to inspect 100 mail-in ballot envelopes/affidavits to do a signature comparison.⁴⁴ After reviewing the mail-in ballots, Ward's expert "found 6 signatures to be inconclusive," and the defendant's expert found 11 to be inconclusive.⁴⁵ Neither found signs of "forgery or simulation."⁴⁶ The court also allowed Ward to inspect duplicate ballots, and out of the 1626 duplicate ballots that were inspected, only 9 errors were

30-20-Amend-Verified-Complaint-1.pdf. The election contest could not be filed until the SoS finished canvassing the votes, which was completed on November 30, 2020. *Ward v. Jackson et. al.*, Maricopa Cnty. Super. Ct., No. CV2020-015285, Verified Petition for Rule 27 Discovery (Nov. 24, 2020), available at <https://www.democracymocket.com/wp-content/uploads/2020/11/11-30-20-Amend-Verified-Complaint-1.pdf>.

³⁶ *Ward v. Jackson*, Maricopa Cnty. Super. Ct., No. CV2020-015285, Statement of Elections Contest pursuant to A.R.S. § 16-673 (Nov. 30, 2020), ¶ 30-1, available at <https://www.democracymocket.com/wp-content/uploads/2020/11/11-30-20-Amend-Verified-Complaint-1.pdf>.

³⁷ *Id.* ¶ 38.

³⁸ *Id.* ¶ 37.

³⁹ A.R.S. § 16-621(A).

⁴⁰ *Ward v. Jackson*, Maricopa Cnty. Super. Ct., No. CV2020-015285, Statement of Elections Contest pursuant to A.R.S. § 16-673 (Nov. 30, 2020), ¶ 26-8, available at <https://www.democracymocket.com/wp-content/uploads/2020/11/11-30-20-Amend-Verified-Complaint-1.pdf>.

⁴¹ *Id.* ¶ 38.

⁴² *Ward v. Jackson*, Maricopa Cnty. Super. Ct., No. CV2020-015285, Minute Entry and Order (Dec. 4, 2020), at 4, available at <https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1930/637426940256270000%20at%207-8>.

⁴³ *Id.* at 6-7, 9.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.* (cleaned up).

⁴⁶ *Id.*

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found.⁴⁷ Nevertheless, Ward's attorney, Wilenchik, argued in his closing that this error rate could have flipped the election results.⁴⁸ The trial court rejected these arguments and concluded that there was "no misconduct, no fraud, and no effect on the outcome of the election."⁴⁹

On the same day that the trial court issued its decision, Ward appealed the ruling to the Arizona Supreme Court. That court unanimously confirmed the election results on December 8, 2020, holding that Ward's lawsuit "fail[ed] to present any evidence of 'misconduct,' 'illegal votes' or that the Biden Electors 'did not in fact receive the highest number of votes for office,' let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results."⁵⁰

While *Ward v. Jackson* was still pending in the Superior Court, Kelli Ward and the other 10 Arizona false electors also pursued litigation to attempt to overturn the election results. On December 2, 2020, all 11 false electors and three county GOP chairs filed a lawsuit against then-Governor Ducey and then-Secretary of State Katie Hobbs and requested that the court order the defendants to decertify the election results.⁵¹ On December 9, 2020, the United States District Court for the District of Arizona dismissed the case on grounds related to Article III standing, abstention, laches, mootness, and federal pleading standards.⁵² In the dismissal order, the court summed up the lack of evidence supporting plaintiffs' claims thus: "Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona's 2020 General Election."⁵³ The plaintiffs filed an appeal to the United States Court of Appeals for the Ninth Circuit, which they subsequently voluntarily dismissed.⁵⁴

⁴⁷ *Id.* at 8.

⁴⁸ Arizona Republican Party, (@azgop), TWITTER (Dec. 6, 2020, 3:26 PM),

<https://twitter.com/AZGOP/status/1335727223165239299?s=20&t=K5aKeaow4B-S-izT23N3cA>.

⁴⁹ *Ward v. Jackson*, Maricopa Cnty. Super. Ct., No. CV2020-015285, Minute Entry and Order (Dec. 4, 2020), at 8, available at

<https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1930/637426940256270000%20at%207-8>.

⁵⁰ *Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817 (Ariz. Dec. 8, 2020), cert. denied, 141 S. Ct. 1381, 209 L. Ed. 2d 125 (2021), at 6, available at

<https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1984/637437053596970000>.

Other individuals and the Trump campaign also filed litigation to challenge the elections results in Arizona, but because *Ward v. Jackson* was specifically filed to give cover for the fake elector scheme, as explained further below, we discuss the case in more detail here. A full list of the other cases can be reviewed at: Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, <https://healthyelections-case-tracker.stanford.edu/results> (last visited July 14, 2023).

⁵¹ Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, *Bowyer v. Ducey*, No. 2:20-CV-02321-DJH (D. Ariz. Dec. 2, 2020).

⁵² *Bowyer v. Ducey*, 506 F.Supp.3d 699, at 708 (D. Ariz. 2020).

⁵³ *Id.* at 724.

⁵⁴ Order Dismissing *Bowyer v. Ducey* Appeal, *Bowyer v. Ducey*, No. 2:20-CV-02321-DJH (9th Circ. Apr. 13, 2021).

D. The False Elector Scheme in Arizona in 2020

1. Origination and organization of the false elector scheme

In the days after Biden was unofficially declared by major media outlets as the winner of the presidential election, the Trump campaign launched a coordinated scheme in the seven battleground states, including Arizona, to have purported electors meet and sign fake certificates casting the states' electoral college votes for Trump. The scheme largely played out from November 30 through January 6, 2021, but its genesis began before that.⁵⁵ The scheme involved staff members of the Trump campaign, Trump's White House staff, and key Trump allies in the target states, some of whom were elected officials.⁵⁶

Kenneth Chesebro, an attorney and outside legal advisor to the Trump campaign, was a main legal architect of the fake elector scheme in all seven target states, authoring legal memos and emails that provided the blueprint for how the plan would operate.⁵⁷ In a legal memo dated November 18, 2020, to James R. Troupis, a Wisconsin-based attorney for the Trump campaign, Chesebro focused his analysis on Wisconsin, suggesting that "the Trump Campaign could gain a few extra weeks for litigation to challenge that state's election results, so long as a Wisconsin slate of Republican nominees to the electoral college met on December 14th to cast placeholder electoral college votes on a contingent basis."⁵⁸

The memo acknowledged that it "may seem odd that the electors pledged to Trump and Pence might meet and cast their votes on December 14 even if, at that juncture, the Trump-Pence ticket is behind in the vote count, and no Certificate of Election has been issued in favor of Trump and Pence."⁵⁹ But the memo argued that doing so on a contingent basis would ensure that "a court decision (or, perhaps, a state legislative determination) rendered after December 14 in favor of the Trump-Pence slate of electors should be timely."⁶⁰

This theory—that organizing a fake slate of electors would create a viable path for Trump to remain president—began to gain momentum with members of the Trump campaign from the top down. For example, as Rusty Bowers testified before the January

⁵⁵ See Jan. 6th Comm. Report, at 341-343.

⁵⁶ For example, on November 6, 2020, U.S. Representative Andy Biggs (R-AZ) texted Mark Meadows, urging him to "encourage the state legislators to appoint [electors]." *Id.* at 115.

⁵⁷ *Id.* at 343; see also Kenneth Chesebro, *Memorandum Re: The Real Deadline for Settling a State's Electoral Votes* (Nov. 18, 2020), at 2, available at <https://www.nytimes.com/interactive/2022/02/02/us/trump-electors-memo-november.html>, [hereinafter, Chesebro Nov. 18 Memo].

⁵⁸ Jan. 6th Comm. Report, at 343.

⁵⁹ Chesebro Nov. 18 Memo, at 2.

⁶⁰ *Id.*

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6 Select Committee, during a November 22, 2020 phone call, Giuliani pressured Bowers, then the Speaker of the Arizona House, to replace the duly elected electors with an alternative slate of Trump electors.⁶¹ Bowers rejected the proposition out of hand.⁶² Giuliani and then Trump himself continued this pressure campaign in the days that followed.⁶³

By the beginning of December, Chesebro's memo had reached Trump's White House Chief of Staff, Mark Meadows. On December 6, 2020, in an email between Meadows and Trump campaign Senior Advisor Jason Miller, Meadows requested a meeting with Miller about Chesebro's November 18th memo. In his response, Miller confirmed that he was aware of the arguments in the memo and stated that members of the team had held "on-background calls on this very subject." In a subsequent response to Miller, Meadows noted that Miller was "on it" and added that "[w]e just need to have someone coordinating the electors for the states."⁶⁴ Miller sent Meadows a spreadsheet that contained contact information for virtually all of the Republican electors in the target states.⁶⁵ A Special Assistant to the President and an assistant to Meadows, Cassidy Hutchinson, later confirmed Meadows' "significant involvement in the plan."⁶⁶ Hutchinson told the January 6th Committee in dramatic testimony that Meadows followed the progress of the fake elector effort closely and that she "remember[ed] him frequently having calls, meetings, and outreach with individuals and this just being a prominent topic of discussion in our office."⁶⁷ When asked how many of his calls or meetings it came up in, she estimated "[d]ozens."⁶⁸

By early December 2020, the Trump campaign was coordinating the false elector scheme in the target states, with Chesebro designated "as the point person for the legal documents going forward" and Michael Roman, the director of Election Day Operations for the Trump campaign, tasked with leading the coordination of the individual false electors.⁶⁹

⁶¹ Bennie Thomas, *Here's every word from the fourth Jan. 6 committee hearing on its investigation*, NPR (June 21, 2022), <https://www.npr.org/2022/06/21/1105848096/jan-6-committee-hearing-transcript>.

⁶² *Id.*

⁶³ Ryan Randazzo and Maria Polletta, *Arizona GOP lawmakers hold meeting on election outcome with Trump lawyer Rudy Giuliani*, ARIZONA REPUBLIC (Nov. 30, 2020), <https://www.azcentral.com/story/news/politics/elections/2020/11/30/republican-lawmakers-arizona-hold-meeting-rudy-giuliani/6468171002/>; Ximena Bustillo, *Arizona lawmaker Rusty Bowers details the pressure put on him by Trump and Giuliani*, NPR (June 21, 2022), <https://www.npr.org/2022/06/21/1106413341/arizona-lawmaker-rusty-bowers-pressure-giuliani>.

⁶⁴ Email from Mark Meadows to Jason Miller (Dec. 6, 2020, 4:33 PM EST), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-MMO03771/pdf/GPO-J6-DOC-MMO03771.pdf>, [hereinafter, Email from Meadows to Miller, Dec. 6, 2020].

⁶⁵ Jan. 6th Comm. Report, at 345.

⁶⁶ *Id.*

⁶⁷ *Id.* at 345-6.

⁶⁸ *Id.* at 346.

⁶⁹ The January 6th Committee described Roman as leading an "Electors Whip Operation." Jan. 6th Comm. Report, at 349-50.

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In the weeks after he sent his November 18 memo, Chesebro continued to press Trump allies, including Wilenchik, who served as legal counsel to the Arizona Republican Party and Kelli Ward, to organize false slates of electors in states beyond Wisconsin. On December 8, 2020, Wilenchik wrote to Boris Epshteyn, a senior advisor and attorney for the Trump campaign, and others: “I just talked to the gentleman who did that memo, Ken Chesebro. His idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (even though the votes aren’t legal under federal law—because they’re not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6th.”⁷⁰ After admitting that the votes were not legal, Wilenchik explained the motive for nevertheless sending the votes: “we would just be sending in ‘fake’ electoral votes to Pence so that ‘someone’ in Congress can make an objection when they start counting votes, and start arguing that the ‘fake’ votes should be counted.”⁷¹ In a follow up email also sent on December 8 to Epshteyn and others, Wilenchik wrote “‘alternative’ votes is probably a better term than ‘fake’ votes,” adding a smiley face emoji.⁷²

As the scheme percolated through the key states, Chesebro and others continued to shape its contours and provide his legal theory to potential participants. Chesebro sent a second legal memo on December 9, 2020, to Wisconsin’s Troupis, in which he acknowledged that none of the Republican electors in six target states (AZ, GA, MI, NV, PA, WI) were “currently certified as having been elected by the voters of their State.” Nevertheless, he advised that taking the “essential steps needed to validly cast and transmit their votes” would allow the votes to be counted later “by a court, the state legislature, or Congress” (emphasis added).⁷³ Critically, the January 6th Committee highlighted that with this memo, Chesebro’s theory had evolved to suggest that “Congress itself could choose among dueling slates of purported electoral votes—and thereby decide the Presidential election—even though Article II of the Constitution grants that power to the electoral college via the States.”⁷⁴ In the memo, Chesebro delivered a step-by-step roadmap outlining federal law requirements and analyzing the relevant laws of each state. Specifically, he laid out when and how the false electors should meet (in private if possible), specified how many “certificates” they should sign and provided examples, and noted how they should mail the fake certificates.⁷⁵ After reviewing the laws in Arizona related to presidential electors, Chesebro concluded that it

⁷⁰ The other recipients of the email were Christina Bobb, Lee Miller, Dennis Wilenchik, Aaron Green, Josh Offenhartz, Christine Ferreira, and Victoria Stevens. See Haberman & Broadwater, *Fake Electors Plan*, *supra* note 2.

⁷¹ Jan. 6th Comm. Report, at 344.

⁷² Haberman & Broadwater, *Fake Electors Plan*, *supra* note 2.

⁷³ Kenneth Chesebro, *Memorandum Re: Statutory Requirements for December 14 Electoral Votes* (Dec. 9, 2020), available at <https://int.nyt.com/data/documenttools/trump-electors-memo-december/eb149df1a68cc512/full.pdf>, [hereinafter, Chesebro Dec. 14 Memo].

⁷⁴ Jan. 6th Comm. Report, at 343.

⁷⁵ Chesebro Dec. 14 Memo.

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was the most “straightforward” state, noting that it did not require presidential electors to meet at a specific place or at a specific time.⁷⁶

The next day, on December 10, 2020, Chesebro emailed Arizona false elector Greg Safsten directly to provide samples of the language for the certificate the false electors could sign, and he attached his November 18 and December 9, 2020, memos.⁷⁷ Safsten at the time was the executive director of the Republican Party of Arizona. In a later email also sent on December 10, 2020, Chesebro provided Safsten and Wilenchik a draft certificate “suitable for Arizona,” noting that he had crafted the language for the certificate from “best practices.”⁷⁸

On December 11, 2020, Chesebro wrote to Wilenchik and confirmed that Giuliani had spoken directly with false elector Kelli Ward and then-Arizona State Representative Kelly Townsend about “the campaign’s request that all electors vote Monday in all contested states.”⁷⁹ Ward and Townsend apparently expressed concern that the fake electoral votes were not legal.⁸⁰ Also on December 11, 2020, Chesebro wrote to Wilenchik: “Just got off the phone with Mayor Giuliani. I told him that 3 days ago, you had told me you planned to seek cert. from the AZ Sup Ct’s dismissal of the case. Do you still plan to do this? If so, can you get the cert. petition on file by Monday? Reason is that Kelli Ward & Kelly Townsend just spoke to the Mayor . . . Ward and Townsend are concerned it could appear treasonous for the AZ electors to vote on Monday if there is no pending court proceeding that might, eventually, lead to the electors being ratified as the legitimate ones.”⁸¹ That same day, as counsel for Ward, Wilenchik filed an appeal of the twice-rejected *Ward v. Jackson* lawsuit with the United States Supreme Court to (in Wilenchik’s words) “give legal cover for the electors in AZ to vote” in favor of Trump.⁸² This was three days before the false electors would meet and sign the fake certificates.

Chesebro again laid out the false elector scheme in more detail to Rudy Giuliani in an email on December 13, 2020, entitled “Brief notes on ‘President of the Senate’

⁷⁶ *Id.* at 5.

⁷⁷ Emails from Kenneth Chesebro to Greg Safsten (Dec. 10-11, 2020), available at <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000918596/pdf/GPO-J6-DOC-CTRL0000918596.pdf>, [hereinafter, Email from Chesebro to Safsten, Dec. 11, 2020].

⁷⁸ *Id.*

⁷⁹ Maggie Haberman & Luke Broadwater, *Arizona Officials Warned Fake Electors Plan Could ‘Appear Treasonous’*, THE NEW YORK TIMES (Aug. 2, 2022),

https://www.nytimes.com/2022/08/02/us/politics/arizona-trump-fake-electors.html?action=click&pgtype=Article&state=default&module=styl-n-capitol-mob&variant=show®ion=BELOW_MAIN_CONTENT&block=storyline_flex_guide_recirc.

⁸⁰ *Id.*

⁸¹ Kelly Townsend did not serve as a fake elector, but Kelli Ward and Kelli Ward’s husband Michael Ward did, and they both signed the fake certificates. See Haberman & Broadwater, *Treasonous*, *supra* note 81.

⁸² *Id.*; SCOTUS denied the motion to expedite consideration in that case on January 11, 2021, well after the deadline for electors from each state to submit the certificate of electoral votes. *Ward v. Jackson*, No. 20-809, Petition for Certiorari to the Supreme Court of the United States (Dec. 11, 2020), available at https://www.supremecourt.gov/DocketPDF/20/20-809/163521/20201211121556721_12-11-20%20Pet%20for%20Writ%20Ward%20v%20Jackson.pdf.

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strategy.”⁸³ The email outlined how the scheme would operate and provided guidance on how to use various levers of power to make courts and state legislatures feel pressure to consider more than one electoral slate. Chesebro explained how Mike Pence, presiding over the joint session of Congress on January 6th, would open “two envelopes from Arizona, and announce[] that he cannot and will not, at least as of that date, count any electoral votes from Arizona because there are two slates of votes.”⁸⁴ In an email to false elector Safsten on the same day, Chesebro confirmed that Giuliani was willing to personally persuade potential false electors to participate, writing, “I talked with [sic] evening with Mayor Giuliani, who is focused on doing everything possible to ensure that that all the Trump-Pence electors vote on Dec. 14. If you think he could help with encouraging your fellow electors to make this happen, please do not hesitate to reach out to me, and I will do my best to get him to follow up.”⁸⁵

Officials and employees of the Republican National Committee were also active participants in the scheme. Days before the false electors signed the Certificate of Votes, Trump personally called the Chair of the Republican National Committee (“RNC”), Ronna McDaniel, to solicit her help in organizing the false electors in each state.⁸⁶ During the call with McDaniel, Trump introduced John Eastman, an attorney, law professor, and outside legal counsel for the Trump campaign, “to talk about the importance of the R.N.C. helping the campaign gather these contingent electors.”⁸⁷ McDaniel explained that it was her understanding that the Trump electors were meeting on a contingent basis “in case something happened where the outcome of a State election changed, based on these legal actions.”⁸⁸ After the call, McDaniel instructed individuals within in the RNC to “reach out and assemble” the Trump electors.⁸⁹

2. Signing the Certificates of Electoral Votes in Arizona

On December 14, 2020, at 10:00 am, the duly elected slate of Democratic electors met to sign Arizona’s “Presidential Elector Ballot” and officially cast their electoral votes for Biden.⁹⁰ Then-Secretary of State Katie Hobbs presided over the signing ceremony,

⁸³ Email from Kenneth Chesebro to Rudy Giuliani (Dec. 13, 2020, 9:48 PM), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman004708/pdf/GPO-J6-DOC-Chapman004708.pdf>, [hereinafter, Email from Chesebro to Giuliani, Dec. 13, 2020].

⁸⁴ *Id.*

⁸⁵ Email from Chesebro to Safsten, Dec. 11, 2020.

⁸⁶ Jan. 6th Comm. Report, at 346.

⁸⁷ Final Report of the Select Committee to Investigate the January 6th Attack on the U.S. Capitol, *Interview of: Ronna McDaniel* (June 1, 2022), at 9, *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000915972/pdf/GPO-J6-TRANSCRIPT-CTRL0000915972.pdf>.

⁸⁸ *Id.* at 9-10.

⁸⁹ *Id.* at 12.

⁹⁰ Governor Katie Hobbs, FACEBOOK LIVE, <https://www.facebook.com/SecretaryHobbs/videos/2020-electoral-college/420122549030605/> (last visited July 14, 2023); *see* Arizona Secretary of State, 2020 *Electoral College*, <https://azsos.gov/elections/results-data/2020-electoral-college> (last visited July 14, 2023).

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caused the state seal to be affixed to the Certificates of Votes, and signed as a witness.⁹¹ Those Certificates of Votes were sent to the Archivist of the United States, who is the head of the National Archives, as well as the other statutorily required recipients.⁹²

On the same day, although they were not legally authorized to do so, the eleven Republican electors who were previously selected by Kelli Ward gathered at the Arizona Republican Party headquarters to cast fake electoral votes. The false electors consisted of Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James Lamon, Robert Montgomery, Samuel Moorhead, Loraine Pellegrino, Gregory Safsten, Kelli Ward, and Michael Ward.⁹³ At the time they gathered on December 14, it was widely known that: (1) the statewide canvass had been completed and certified for Biden, giving the Democratic electors the right to cast votes for President; (2) the margin of victory was over ten thousand votes; (3) there was no pending court-ordered recount; and (4) almost all pending litigation challenging the Arizona presidential election had been dismissed or rejected by state courts.⁹⁴

The false electors purported to be the “duly elected and qualified Electors for President and Vice President of the United States of America from the State of Arizona.”⁹⁵ They certified that they had “convened and organized...to perform the duties enjoined upon us...” and signed six identical copies of the fake election certificate while recording themselves on video.⁹⁶ The video shows that after listening to someone read aloud the text from the fake certificate, the false electors clapped and signed their names.⁹⁷ A staff member from the Trump campaign, Thomas Lane, who had seemingly been sent to Arizona by the Trump campaign to oversee the operation, can be seen on video passing

⁹¹ Governor Katie Hobbs, FACEBOOK LIVE, <https://www.facebook.com/SecretaryHobbs/videos/2020-electoral-college/420122549030605/> (last visited July 14, 2023). This document is called a Certificate of Votes in federal law. However, the caption placed on the Arizona Certificate of Votes in 2020 was “Presidential Elector Ballot.” Legally speaking, they are the same thing.

⁹² *Arizona Presidential Elector Ballot Certificate of Vote 2020* (Dec. 14, 2020), <https://www.archives.gov/files/electoral-college/2020/vote-arizona.pdf>.

⁹³ Kira Lerner, *Trump’s fake electors: Here’s the full list*, AZ MIRROR (Feb. 1, 2022), <https://www.azmirror.com/2022/02/01/trumps-fake-electors-heres-the-full-list/>.

⁹⁴ When the false electors met, only one election contest remained open in state court. That case was untimely filed. Indeed, it was dismissed as untimely on Dec. 15, 2020, the very next day. *Burk v. Ducey*, Pinal Cnty. Super. Ct., No. CV2020-01869, Ruling on Motion to Dismiss (Dec. 7, 2020), available at <https://elections.maricopa.gov/asset/jcr:8f65c472-f56b-480e-aff4-96d50e1a30b7/Burk%20v.%20Ducey%20-%20Court%20Order%20ruling%20on%20MTD%20filed%20121520.pdf>.

⁹⁵ *Certificate of Vote from the Republican slate of electors from the State of Arizona* (Dec. 14, 2020), <https://www.archives.gov/files/foia/az-full-1.pdf>, [hereinafter, Arizona Fake Certificate].

⁹⁶ Arizona Republican Party, (@azgop), TWITTER (Dec. 14, 2020, 2:42 PM), <https://twitter.com/AZGOP/status/1338600278459727872?s=20>.

⁹⁷ *Id.*

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out copies of the phony election certificates.⁹⁸ Nancy Cottle served as chair and Loraine Pellegrino served as secretary for the group.⁹⁹

The cover page of the fake certificates listed recipients as the President of the Senate, Archivist of the United States, Arizona Secretary of State, and Chief Judge, U.S. District Court for the District of Arizona.¹⁰⁰ The fake certificates from Arizona were delivered to the Archivist of the United States and the President of the Senate.¹⁰¹ While there is no conclusive evidence as to who physically sent the fake certificates to the respective offices, the cover memorandum for the certificate stated that the certificate was from “Nancy Cottle, Chairperson, Electoral College of Arizona.”¹⁰²

Notably, the false electors in Arizona did not include any conditional language in their fake certificates. Although there was no basis in law for a false slate of electors in any state, the false electors in Pennsylvania and New Mexico included conditional language in the text of their certificate. In New Mexico, the text read: “WE, THE UNDERSIGNED, on the understanding that it might later be determined that we are the duly elected and qualified Electors for President and Vice President of the United States of America from the State of New Mexico.”¹⁰³ Similarly, in Pennsylvania, the text read: “WE, THE UNDERSIGNED, on the understanding that if, as a result of a final non-appealable Court Order or other proceeding prescribed by law, we are ultimately recognized as being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Pennsylvania.”¹⁰⁴ In early 2022, Pennsylvania’s then-Attorney General, Josh Shapiro, determined that the inclusion of this conditional language foreclosed criminal charges for forgery against the Pennsylvania false electors.¹⁰⁵

⁹⁸ *Id.* Jan. 6th Comm. Report, at 350, 356 n.76; Lane was subpoenaed by the FBI as part of its investigation into the fake elector scheme. He is currently serving as Elections Counsel and Director of Election Coalitions at the U.S. House of Representatives – Committee on House Administration, advising the Committee on House Administration on elections. See Heidi Przybyla & Zach Montellaro, *Former Trump campaign staffer subpoenaed by DOJ is now working for House committee on elections*, POLITICO (May 5, 2023), <https://www.politico.com/news/2023/05/05/former-trump-staffer-elections-committee-00095490>.

⁹⁹ Arizona Fake Certificate.

¹⁰⁰ *Id.* (These were the recipients required by federal law in 2020. See 3 U.S.C. § 11 (2020)).

¹⁰¹ *Id.*; Jan. 6th Comm. Report, at 354-5; See also, Nat’l. Archives, *2020 Presidential Election Unofficial Certificates submitted to The Office of the Federal Register*, <https://www.archives.gov/foia/2020-presidential-election-unofficial-certificates> (last visited July 18, 2022).

¹⁰² *Id.*

¹⁰³ *Certificate of Vote from the Republican slate of electors from the State of New Mexico* (Dec. 14, 2020), at 1, <https://www.archives.gov/files/foia/nm-full.pdf>.

¹⁰⁴ *Certificate of Vote from the Republican slate of electors from the State of Pennsylvania* (Dec. 14, 2020), at 1, <https://www.archives.gov/files/foia/pa-cov-full.pdf>.

¹⁰⁵ Mike Wereschagin, *Pa. Republicans’ hedged language may have saved them from prosecution over electoral vote scheme*, LNP: LANCASTER ONLINE (Jan. 17, 2022), https://lancasteronline.com/news/politics/pa-republicans-hedged-language-may-have-saved-them-from-prosecution-over-electoral-vote-scheme/article_849d4f7e-7589-11ec-8881-6383a823557d.html.

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After the false electors in various states met and signed fake certificates on December 14, 2020, the GOP's McDaniel sent a note to the White House with the names of the electors who had done so.¹⁰⁶ The next morning, Kelli Ward informed viewers of the Arizona Republican Party's YouTube channel that the false electors had signed and cast their votes for Trump and Pence. She stated:

"December 14th, the true electors for the Presidency met yesterday, yes the Republican electors. We gathered together, we took a vote for President Trump and for Mike Pence for President and Vice President. We have transmitted those results to the proper entities in Washington, D.C. for consideration by Congress. We believe that we are the electors for the legally cast votes here in Arizona. Now, there is historic precedent for this move. There's a lot of precedent, but let's talk about 1960. In 1960, the Democrat electors for John F. Kennedy met despite the fact their governor had certified the election for Richard Nixon. They transmitted their, their [sic] votes and those votes were awarded to President Kennedy 11 days after they cast those votes. So, this election is far from over. Anyone who is telling you differently, whether it's in the media, whether it's the Democrat Talking Heads or whether it's the Republican establishment is just avoiding the facts. The fact is there are a lot of legal challenges out there and this is a contested election and so, stay strong. I thank all of you for fighting for this and for fighting for the 74 million plus Americans who voted for President Trump. In this, we truly are all in this together. Let's work hard and I'll see you tomorrow."¹⁰⁷

On December 14, 2020, Biden received sufficient votes in the Electoral College to win the presidency.¹⁰⁸ Subsequently, the President of the Senate (Vice President Pence) was scheduled to count the electoral votes on January 6, 2021, a Joint Session of Congress, which would then officially declare the election for Biden.¹⁰⁹

In the weeks after the December 14th Electoral College vote, Trump and his allies continued to advance the false elector scheme in an effort to have Pence to use his position as presiding officer over the Joint Session to hand Trump the presidency.¹¹⁰ For example, on December 27, 2020, then-U. S. Representative Louis Gohmert and the 11 Arizona false electors sued Pence in a Texas federal district court. The plaintiffs, alleging

¹⁰⁶ Select Committee to Investigate the January 6th Attack on the U.S. Capitol, *Interview of Ronna McDaniel* (June 1, 2022), at 18, available at <https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000915972/pdf/GPO-J6-TRANSCRIPT-CTRL0000915972.pdf>.

¹⁰⁷ Arizona Republican Party, *AZGOP State of the Race Update (12/15/20)*, YOUTUBE (Dec. 15, 2020), at 00:19-01:50, <https://youtu.be/TIpJA5X2Bcc>.

¹⁰⁸ Jonathan Lemire & AP Writers, *Electoral College makes it official: Biden won, Trump lost*, THE ASSOCIATED PRESS (Dec. 14, 2020, 10:10 PM), <https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e>.

¹⁰⁹ *Id.*; see also Nat'l. Archives, *2020 Presidential Election*, at 12-3.

¹¹⁰ Jan. 6th Comm. Report, at 341-2.

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that there were “competing slates” of electors, asked the court to declare that the Electoral Count Act is unconstitutional and that the Vice President has the “exclusive authority and sole discretion” to determine which slates of electoral votes should be counted.¹¹¹ On January 1, 2021, the district court dismissed the lawsuit because the plaintiffs did not have standing, and that dismissal was affirmed on appeal on January 2, 2021.¹¹² Similarly, false elector and current Arizona State Representative Jake Hoffman sent a letter to Pence on January 5, 2021, requesting that Pence overturn the will of millions of Arizona voters and allow the Arizona legislature to decide who would serve as presidential electors for the state.¹¹³

Trump and his advisors also directly pressured Pence. In an email to Eastman and Epshteyn sent on January 1, 2021, Chesebro lobbied for Pence to “derail the joint session of Congress” arguing that he could do so because “there are two competing slates of electoral votes in several States and [Pence could] tak[e] the position that only he, or possibly Congress, could resolve any disputes concerning them.”¹¹⁴

On January 4, 2021, Chesebro forwarded Eastman the email he had written to Giuliani on December 13, 2020, that laid out the false elector scheme in detail.¹¹⁵ Eastman and Chesebro worked together to coordinate arguments in support of the fake votes.¹¹⁶ In late December and early January 2021, Eastman authored two memos that asserted theories similar to those in Chesebro’s earlier memos. Eastman wrote that the Vice President, serving as President of the Senate, could unilaterally “reject the certified electors from several States won by [Biden]” or “delay the joint session to give State legislatures the opportunity to certify new electors loyal to the President.”¹¹⁷

His plan was to use “dual slates of electors” to throw the joint session of Congress into chaos and thwart the declaration of Biden as President.¹¹⁸ The plan to disrupt the counting of the electoral votes therefore hinged on the fake certificates of votes from Arizona and other states, as well as Pence’s cooperation.

¹¹¹ *Gohmert v. Pence*, 510 F. Supp. 3d 435, at 438–39 (E.D. Tex.), *aff’d*, 832 F. App’x 349 (5th Cir. 2021).

¹¹² *Id.* at 443; *Gohmert v. Pence*, 832 F. App’x 349, at 350 (5th Cir. 2021), cert. denied. The U.S. Supreme Court denied the plaintiff’s application for expedited considerations on Jan. 7, 2021, *available at* <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a115.html>.

¹¹³ Richard Ruelas, *Rep. Jake Hoffman letter asked Pence to not count Arizona’s 2020 electoral college votes*, ARIZONA REPUBLIC (last updated Feb. 18, 2022, 10:05 AM), <https://www.azcentral.com/story/news/politics/arizona/2022/02/16/rep-jake-hoffman-asked-pence-not-accept-arizona-electoral-votes/6820511001/>.

¹¹⁴ Jan. 6th Comm. Report, at 356.

¹¹⁵ Email from Kenneth Chesebro to John Eastman (Jan. 4, 2021, 8:41 PM PST), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman004708/pdf/GPO-J6-DOC-Chapman004708.pdf>, [hereinafter, Email from Chesebro to Eastman, Jan. 4, 2021].

¹¹⁶ Jan. 6th Comm. Report, at 356.

¹¹⁷ *Id.* at 428.

¹¹⁸ *Id.* at 356.

Pence ultimately rejected Trump's pressure to count the fake electoral votes or send the issue back to the seven states for resolution by state legislatures. and Joe Biden was declared President on the early morning of January 7, 2021, hours after the insurrection by Donald Trump supporters in our nation's capital that left five people dead and 138 police officers injured.¹¹⁹

III. LEGAL ANALYSIS – POTENTIAL CRIMINAL CHARGES

Criminal Code Offenses

As explained below, the current publicly available evidence demonstrates that organizers and participants in the false elector scheme may have committed several crimes under Arizona law. This section reviews each potentially applicable statute. For the most part, setting aside mental state elements, publicly available information shows that the other elements of these statutes are likely satisfied as to the false electors and others involved. Proving intent or other mental state requirements will generally be more challenging. First, we review the law concerning intent in our statute-by-statute analyses (sections III.A through III.F). Then, in a separate section (section III.G), we focus on the intent requirements for the relevant crimes, explaining what we know from public information and what additional investigation may reveal regarding the mental state of the false electors and others involved.

This section analyzes the potential criminal code offenses in the following order:

- Forgery, A.R.S. §13-2002
- Tampering with a Public Record, A.R.S. § 13-2407
- Criminal impersonation, A.R.S. § 13-2006
- Presentment of False Instrument for Filing, A.R.S. § 39-161
- Fraudulent Schemes and Artifices, A.R.S § 13-2310
- Conspiracy, A.R.S. § 13-1003

A. Forgery, A.R.S. § 13-2002

A person commits forgery under Arizona law if:

- (1) They either
 - a. falsely made, completed, or altered a written instrument, OR
 - b. knowingly possessed a forged instrument, OR

¹¹⁹ Nat'l. Archives, *2020 Electoral College Results*, <https://www.archives.gov/electoral-college/2020#:~:text=Due%20to%20violent%20unrest%20in,morning%20of%20January%207%2C%202021> (last visited July 25, 2023); see Michael Schmidt and Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, THE NEW YORK TIMES (July 12, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html>.

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- c. offered or presented, whether accepted or not, a forged instrument or one containing false information, AND

(2) Did so with the intent to defraud.

See A.R.S. § 13-2002(A); Rev. Ariz. Criminal Jury Instructions 20.02 (5th Ed. 2019) [hereinafter, RAJI (CRIMINAL) 5th].

1. Falsely made, knowingly possessed, or offered or presented

There are several alternative means of satisfying the first element. This subsection discusses each method, in turn.

a. Falsely made

First, the false electors, and others who aided in the creation of the fake certificates, likely satisfy the first alternative prong (1.a. as listed above) of this element because they falsely made or completed a written instrument. See A.R.S. § 13-2002(A)(1); see also A.R.S. §§ 13-301, 13-303 (extending liability to accomplices who aid or counsel another person in planning or committing an offense or provide the means to another to commit the offense); *State v. Rea*, 145 Ariz. 298, 299 (App. 1985) (concluding that a conviction turned on whether there was sufficient proof that “defendant either falsified or aided another to falsify the check”).¹²⁰ A “written instrument” is defined to include “[a]ny paper, document or other instrument that contains written or printed matter or its equivalent.” A.R.S. § 13-2001(12)(a).

To falsely “make” a written instrument means “to make or draw a complete or incomplete written instrument that purports to be an authentic creation of its ostensible

¹²⁰ Arizona has jurisdiction over out-of-state actors for substantive crimes, such as forgery, to the extent those out-of-state actors aided and abetted criminal conduct that occurred in Arizona. See A.R.S. §§ 13-108, 13-301, 13-303; *State v. Duffy*, 124 Ariz. 267, 273 (App. 1979). Based on the facts discussed herein, the signing of the certificates in Arizona by the false electors supports jurisdiction over out-of-state actors connected to these acts.

As an alternative to (or in addition to) charging those who encouraged the commission of forgery (or the other offenses we discuss) by way of accomplice liability, the government could charge them with the crime of solicitation. That crime occurs when a person, with the intent to facilitate an underlying crime, encourages or requests that another person engage in criminal conduct. A.R.S. § 13-1002(A). At least in the context of these facts, however, it does not appear that solicitation would extend liability to anyone who would not already qualify as an accomplice. Cf. *State v. Woods*, 168 Ariz. 543, 545, 815 P.2d 912, 914 (App. 1991) (without deciding the issue, observing that the defendant had at most “established that the offense of solicitation to sell a narcotic drug is the same offense as sale of a narcotic drug by an accomplice”). And a solicitation conviction usually carries lesser penalties. A.R.S. § 13-1002(B). Moreover, as later discussed, because the solicitation of certain offenses discussed in this memorandum is a misdemeanor, and misdemeanors have a statute of limitations of one year, that limitations period has likely expired for those solicitation offenses.

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maker but that is not either because the ostensible maker is fictitious, or because, if real, the ostensible maker did not authorize the making or drawing of the written instrument.” *See* A.R.S. § 13-2001(7). To falsely “complete” a written instrument means “to transform an incomplete written instrument into a complete one by adding . . . matter without the permission of anyone entitled to grant it, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.” *See* A.R.S. § 13-2001(6).

Here, the fake certificates qualify as “written instruments.” They were “falsely ma[de]” under the law because the false electors lacked authority to make them. Once signed, the fake certificates purported to be authentic certificates—they imitated the form of authentic certificates and were sent to the Archivist of the United States, where authentic certificates are sent.¹²¹ But the false electors were not granted authority to create these certificates by the voters of Arizona, by any state official with the power to grant it, or otherwise by any legal process. Therefore, the conduct of the eleven false electors who signed the fake certificates, as well as of others who aided the scheme like Chesebro (who provided a template and language for the false electors to use) and Wilenchik (who in various ways aided false electors), satisfy this prong.

b. Knowingly possessed

Second, any of the signers, creators, or transmitters of the fake certificates would likely also satisfy the second alternative, which requires knowingly possessing a forged instrument. *See* A.R.S. § 13-2002(A)(3). “Possession” is defined as “a voluntary act if the defendant knowingly exercised dominion or control over property.” *See* A.R.S. § 13-105(35). One who commits forgery via the possession prong has committed a lesser included offense of the greater crime of forgery via offering or presenting a forged document. *State v. Berliew*, No. 1 CA-CR 17-0093, 2018 WL 2306993, at *3 (Ariz. Ct. App. May 22, 2018) (memorandum decision) (so holding because, to present a forged instrument, a defendant must necessarily first knowingly possess it). By the same logic, possession of a forged instrument is a lesser included offense of the greater crime of falsely making or completing a written instrument. Here, the false electors knowingly possessed the fake certificates when they signed them and authorized their submission to the Archivist, the President of the Senate, and other offices.

c. Offered or presented

Lastly, the third alternative prong would be satisfied by anyone who transmitted or aided in transmitting the fake certificates to the United States Senate or the Archivist, because in so doing they offered or presented a forged instrument or one containing false information. *See* A.R.S. § 13-2002(A)(3); *see also* A.R.S. §§ 13-301, 13-303. The fake certificates would qualify as a “forged instrument” under Arizona law. *See* A.R.S. § 132001(8) (forged instrument defined as a “written instrument that has been

¹²¹ Nat’l. Archives, *2020 Presidential Election*, at 5.

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falsely made, completed or altered”). The false electors violated this prong by signing the certificates and authorizing their submission to the Archivist, the President of the Senate and other offices. In sum, the first element could likely be satisfied under any of the three alternative prongs.

2. Intent to defraud

Proving the second element, intent to defraud, could be more challenging. Intent to defraud requires that it was the defendant’s “objective to cause a particular result through deception.” *State v. Allen*, 235 Ariz. 72, at 76 (App. 2014) (cleaned up). Intent to defraud can therefore be conceptualized as requiring (a) a qualifying intended result, and (b) an intent to achieve that result through deception.

a. Intended result

As to the intended result, in the typical case an intent to defraud is found where the defendant intends to cause a monetary loss or gain. *State v. Thompson*, 194 Ariz. 295, at 297 (App. 1999). But an intent to defraud can also be found when there is intent to impair a governmental function. *Id.* at 298 (holding that a defendant who forged vehicle registrations, for no apparent monetary reason, had an intent to defraud because he “intentionally undermined the authenticity and accuracy of those records and impaired a government function”); see also *State v. Soriano-Torres*, No. 1 CA-CR 13-0468, 2014 WL 3608692, at *2 (Ariz. Ct. App. July 22, 2014) (affirming forgery conviction based on false information on tax forms used to gain employment because doing so “impaired the governmental function of collecting taxes”). It is irrelevant whether anyone was actually injured, *Thompson*, 194 Ariz. at 297, and the factfinder can consider whether the conduct “risked trouble for some unknown person” in ascertaining whether intent to defraud existed. *Allen*, 235 Ariz. at 75 (upholding forgery conviction based on false signature on a written warning for trespassing). Here, the fake certificates could have and did impair a government function--namely the conduct of a presidential election and the lawful transition of power.

b. Achieve result through deception

The second part of intent to fraud—that the defendant intended to cause this result through deception—could be more challenging. In forgery cases, it is often not disputed that the document was forged. Rather, what is disputed is whether the defendant *knew* that the document was forged, and that the defendant therefore intended to deceive when creating or transmitting the document. See, e.g., *State v. Valdivia*, No. 1 CA-CR 16-0867, 2021 WL 1578157, at *4 (Ariz. Ct. App. Apr. 22, 2021) (in a case where defendant did not dispute that she attempted to cash a forged check, defining the “primary question before the jury” as whether the defendant “intended to defraud the bank when she gave them a forged check, or whether she unknowingly handed over the check after being duped by [a third party]”); *State v. McFarland*, No. 1 CA-CR 17-0679, 2018 WL 5306475, at *3 (Ariz. Ct. App. Oct. 25, 2018) (affirming a forgery conviction

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after concluding that sufficient evidence showed that the defendant “knew the supervisor’s signature on his ticket was invalid and that he knowingly, with an intent to defraud, presented the ticket for payment”); *see also State v. Maxwell*, 95 Ariz. 396, 399 (1964) (holding that the evidence had to show that the “signer had knowledge of his lack of authority”). Moreover, the *Maxwell* court concluded that a factfinder cannot infer intent to defraud *only* from the unauthorized use of another’s name. *Id.*

Mental states can be proven, however, by either direct or circumstantial evidence. *See Thompson*, 194 Ariz. at 298. Further, courts have held that “the possession by the defendant of a forged instrument requires only slight corroborative proof of other inculpatory circumstances in order to sustain a conviction.” *State v. Dixon*, 7 Ariz. App. 457, 458 (1968). In *Dixon*, for example, the court held that, because it was evident on the face of a check that it was forged, minimal additional evidence of mens rea (beyond the defendant’s possession of the forged check) was required to prove intent to defraud. *Id.*

Here, there is circumstantial evidence that all of the false electors intended to deceive because they all signed certificates that falsely stated that the false electors were the “duly elected” presidential electors of Arizona (when they were not) and falsely purported to cast Arizona’s electoral votes to the Trump-Pence ticket (when the false electors had no authority to do so). By that point in time (December 14), it had been widely publicized that the statewide canvass had been completed and certified for Biden, that the margin of victory was over ten thousand votes, that there was no pending recount, and that Governor Ducey had certified the Biden electors as the duly elected presidential electors for Arizona.¹²² The false electors and other participants in the scheme undoubtedly knew that the fake certificates were not the official, government-sanctioned documents.

Nevertheless, some additional evidence of intent to defraud could be important. Some false electors—at least, for example, Jim Lamon and Loraine Pellegrino—have said publicly that they believed the certificate was just a contingency plan in the event litigation or some other process caused the Biden electors to be decertified. If true, at least some of the false electors may not have intended to deceive anyone concerning the legal force of the fake certificate. By contrast, the email exchanges acknowledging the falsity of certificates are powerful evidence of intent to defraud, at least as to the participants in those exchanges like Chesebro, Wilenchik, and others.

Accordingly, there is likely a current basis for prosecution against, at a minimum, Chesebro and Wilenchik for forgery. Further investigation and additional evidence could establish a stronger basis for prosecution of the false electors and scheme organizers. The strength of forgery charges against the false electors will largely depend on the

¹²² *See* Reid Epstein, *Arizona and Wisconsin Certify Biden’s Wins: ‘The System Is Strong,’* THE NEW YORK TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/us/politics/wisconsin-arizona-election-results.html>.

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strength of the evidence that each false elector had intent to defraud—in particular, whether they intended to deceive others into believing that the fake certificate were genuine documents with the authority to cast Arizona’s electoral votes.

B. Tampering with a Public Record, A.R.S. § 13-2407

In relevant part, a person commits the crime of tampering with a public record if, knowingly and with intent to defraud, that person either:

1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record; or

...

3. Records, registers or files or offers for recordation, registration or filing in a governmental office or agency a written statement which has been falsely made, completed or altered or in which a false entry has been made or which contains a false statement or false information . . .

A.R.S. § 13-2407(A)(1), (3). “Public record” is defined to include any official paper, written instrument, or record “created, issued, received or kept by any governmental office or agency or required by law to be kept by others for the information of the government.” *See* A.R.S. § 13-2407(B). Accordingly, the fake certificates would qualify as documents purporting to be a public record as the fake certificates imitated the form of the real certificates, which are public records received and kept by the National Archives, a governmental office.¹²³

The elements of the first relevant method of committing this crime are:

1. The defendant knowingly made or completed a written instrument which purported to be a public record or a true copy thereof,
2. The defendant knew the instrument had been falsely made, AND
3. The defendant did so with the intent to defraud.

See A.R.S. § 13-2407(A)(1); RAJI (CRIMINAL) 5th 20.02.

The first element would be easily established. By signing fake certificates, the false electors knowingly made or completed written instruments purporting to be public records. We turn to the second and third elements, concerning knowledge of falsity and intent to defraud, later below.

¹²³ Nat’l. Archives, *2020 Presidential Election*, at 11.

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The elements of the other relevant method of committing this crime are:

1. The defendant knowingly presented or used a written instrument that was, or purported to be, a public record or copy,
2. The defendant knew that the public record had been falsely made, completed or altered, or that a false entry had been made,
3. The defendant did so with the intent that the written instrument be taken as genuine, AND
4. The defendant did so with the intent to defraud.

See A.R.S. § 13-2407(A)(3); RAJI (CRIMINAL) 5th 20.02. To the extent a false elector or other actor participated in transmitting the fake certificates to the President of the U.S. Senate, the Archivist of the United States, the Arizona Secretary of State, or the United States District Court the first element would be satisfied.

The knowledge and intent elements of both potential violations could require more evidence to prove. “Knowingly” does not require knowledge that one’s conduct is unlawful, but it does require, “with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person’s conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.” See A.R.S. § 13-105(10)(b). The requirement that conduct be done “knowingly” is a higher standard than, say, when the standard is “recklessly,” which only requires that, “with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” See A.R.S. § 13-105(10)(c). Accordingly, it would not be enough to show merely that the false electors *should* have known that the certificates were false. Nevertheless, the state can also meet its burden in proving knowledge by showing that the defendant deliberately avoided learning the truth. In a fraud case, for example, the Arizona Supreme Court held that there was sufficient evidence of defendant’s knowledge because “even if defendant had no actual knowledge of the fraud, he was aware of the high probability that the scheme was fraudulent and deliberately shut his eyes to avoid learning the truth.” *State v. Haas*, 138 Ariz. 413, 420 (1983); see also *State v. Fierro*, 220 Ariz. 337, 339 (App. 2008) (in a drug possession case where the state had “presented no direct evidence that [the defendant] actually knew he was transporting marijuana,” holding that the jury was properly instructed that “knowledge can be established by showing that the defendant was aware of the high probability that the packages contained marijuana, and that he acted with conscious purpose to avoid learning the true contents of the packages” (cleaned up)). Thus, even circumstantial evidence that a false elector deliberately avoided learning that the fake certificates were indeed fake could satisfy the knowledge requirement.

As with forgery, “intent to defraud” need not involve intent to cause any particular person an injury but can be shown by intent to impair a government function. *Id.* at 298. Though it appears that no other caselaw substantively addresses this element in the

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context of this offense, cases addressing the term “intent to defraud” in the context of the forgery statute seemingly also apply here. *See id.* (after analyzing intent to defraud for purposes of forgery counts and upholding defendant’s convictions, holding that the defendant’s argument concerning the tampering statute, which requires an intent to defraud or deceive, “fails for the same reason”). Accordingly, it would also be necessary to prove that it was the defendant’s “objective to cause a particular result through deception.” *State v. Allen*, 235 Ariz. 72, 76 (App. 2014) (cleaned up).

In sum, the strength of a tampering with a public record charge will largely hinge on the strength of the evidence that the organizers and false electors knew the certificates were false and signed or submitted them with the intent to impair the counting of the official election results at the joint session of Congress on January 6, 2021. The current publicly available evidence likely supports tampering charges against, at a minimum, Kelli Ward, Chesebro, and Wilenchik. Further investigation and additional evidence could bolster the case against the false electors and others who aided and abetted the scheme.

C. Criminal impersonation, A.R.S. § 13-2006

A person commits the crime of criminal impersonation, in relevant part, by either (1) “[a]ssuming a false identity with the intent to defraud another” OR (2) “[p]retending to be a representative of some person or organization with the intent to defraud.” *See* A.R.S. § 13-2006(A)(1), (2). Both of those means of committing criminal impersonation could plausibly apply to the false electors, to the extent the evidence shows that they had the intent to defraud when they pretended to be something which they were not—the elected presidential electors of Arizona. But there is little case law or statutory definitions elaborating on these provisions or defining key terms. Accordingly, it remains uncertain whether Arizona courts would conclude that either of these scenarios could apply to false electors, but the better argument is that the second prong would apply.

1. Assuming a false identity

The false electors might have committed criminal impersonation via the first prong, by assuming a “false identity,” if the term “false identity” is broad enough to encompass falsely assuming a position that one does not actually hold. But if the term is construed more narrowly—such as to only encompass falsely using personal identifying information of another, such as their name or Social Security Number—then this prong of the criminal impersonation statute would not apply to false electors. The criminal impersonation statute does not define the term; nor is it defined in that criminal code chapter’s list of definitions. *See* A.R.S. §§ 13-2001, 13-2006. The few published cases we found citing this prong of the statute involved convictions based on the use of personal identifying information, *see, e.g., State v. Romero-Gomez*, No. 1 CA-CR 18-0522 PRPC, 2019 WL 1125581, at *1 (Ariz. Ct. App. Mar. 12, 2019), but these cases did not address whether other types of conduct would suffice. The most useful guidance comes from other criminal statutes in the same chapter of the criminal code that use the term

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“identity” in the narrower sense. These statutes prohibit taking or trafficking in “the identity of another person,” which is defined as taking certain unlawful actions with another person’s “personal identifying information.” See A.R.S. §§ 13-2008, 13-2009, 13-2010. “Personal identifying information,” in turn, is defined to mean a name, signature, address, various identification numbers, and the like. See A.R.S. § 13-2001(10). That suggests that the criminal impersonation statute, too, uses the term “identity” in this narrower sense. In sum, even setting aside the need to prove intent to defraud, it seems unlikely—although not foreclosed—that this prong of the statute can serve as a basis for prosecuting false electors.

2. Pretending to be a representative of some person or organization

The second prong of the criminal-impersonation statute is more promising, if also subject to some uncertainty. The false electors may have violated this prong—which concerns “[p]retending to be a representative of some person or organization with the intent to defraud”—by having pretended to hold the position of presidential elector. The false electors were purporting to be the “duly elected” representatives of the voters of Arizona and the state of Arizona, which seems to fit squarely within the spirit (and comfortably within the text) of the term “representative of some person or organization.”¹²⁴ The false electors might argue otherwise, given that neither case law nor statutes elaborate on what that phrase means. And the few cases we found involving criminal-impersonation convictions under this theory appear to involve fact patterns quite a bit more conventional than false electors, such as false representations about employment. See, e.g., *State v. Ludwig*, No. 1 CA-CR 16-0735, 2017 WL 3484502, at *3 (Ariz. Ct. App. Aug. 15, 2017, amended Feb. 5, 2018) (involving a defendant who, while no longer employed by the Arizona Attorney General’s Office, falsely implied that he was).

But no case suggests that this statute would not apply to these facts. Moreover, Black’s Law Dictionary defines “organization” as a “group that has formed for a particular purpose,” gives the intergovernmental entity “World Trade Organization” as an example, and notes that it has historically been used “for the institution of the magistracies and even the whole state.” Organization Definition, *Black’s Law Dictionary* (11th ed. 2019) (emphasis added). Accordingly, absent contrary authority, the term organization likely encompasses governmental units, such as the State of Arizona. Thus, with sufficient evidence of intent to defraud, the “pretending to be a representative” prong of the criminal-impersonation statute likely could serve as a vehicle for prosecuting false electors.

Although Arizona courts have not directly addressed the meaning of “intent to defraud” for purposes of this statute, the term likely has the same meaning as in the forgery and

¹²⁴ See Arizona Fake Certificate, at 2 (“WE THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Arizona, do hereby certify the following...”).

tampering statutes. *See, e.g., State v. Thompson*, 194 Ariz. 295, 298 (App. 1999). Accordingly, it would also be necessary to prove that it was the defendant's "objective to cause a particular result through deception." *State v. Allen*, 235 Ariz. 72, 76 (App. 2014) (cleaned up).

In sum, although subject to some uncertainty, the criminal impersonation statute could likely serve as a vehicle for prosecuting false electors (and their accomplices) under the theory that they were pretending to be representatives of an organization. The strength of these charges would largely depend on the evidence of intent to defraud.

D. Presentment of False Instrument for Filing, A.R.S. § 39-161

A person commits the crime of presentment of a false instrument if they satisfy three elements: the person (1) "acknowledges, certifies, notarizes, procures or offers to be filed, registered or recorded in a public office in this state"; (2) "an instrument he knows to be false or forged"; (3) "which, if genuine, could be filed, registered or recorded under any law of this state or the United States." *See* A.R.S. § 39-161; *see also* RAJI (CRIMINAL) 5th 39.161.

The first element, requiring a defendant's involvement in the filing or recording of the instrument, should be satisfied as to false electors whether or not they were the ones who transmitted the fake certificates to government offices for filing. It is enough that the defendant's actions "caused an instrument . . . to be placed in a situation whereby the instrument would ultimately be recorded." *State v. Edgar*, 124 Ariz. 472, 475 (1979) (rejecting argument that a defendant cannot be found guilty "because he did not file the instruments himself"). Indeed, the statute does not even require that the document actually be filed or recorded—it is enough that a defendant prepared the documents and "then submitted them to people who he had reason to believe would accept and record them." *Id.*

The second element requires evidence that the defendant knew the instrument was false or forged. A false or forged instrument is not one that merely contains a false statement, but it must be an instrument that purports to be genuine when it is, in fact, not. *See State v. Jones*, 222 Ariz. 555, 563 (App. 2009). Unlike the forgery statute, this statute does not require proof of fraudulent intent. *State v. Edgar*, 124 Ariz. 472, 474 (1979). But the government must prove that the defendant knew that the instrument was false. *State v. Royer*, 150 Ariz. 501, 504 (App. 1986). Accordingly, proof would be required that the defendants knew that the fake certificates were purporting to be, but were not in fact, genuine. Proof that the defendants deliberately avoided learning that the certificates were not genuine would also suffice to prove knowledge. *See State v. Haas*, 138 Ariz. 413, 420 (1983); *State v. Fierro*, 220 Ariz. 337, 339 (App. 2008).

The third element would be easily satisfied by both laws of Arizona and of the United States, *see* A.R.S. § 39-161, which authorize the filing of such authentic certificates.

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In sum, presentment of a false instrument for filing is a viable charge against false electors and their accomplices. The strength of such charges will depend primarily on the strength of the evidence showing that the defendants knew the fake certificates were not genuine.

E. Fraudulent Schemes and Artifices, A.R.S § 13-2310

A person commits the crime of fraudulent schemes and artifices if:

1. A plan or scheme existed, the purpose of which was to defraud others,
2. The person knowingly used false or fraudulent pretenses, representations, promises, or material omissions,
3. The person knowingly acted pursuant to the plan or scheme, AND
4. As a result, the person obtained any benefit.

See RAJI (CRIMINAL) 5th 23.10; *State v. Bridgeforth*, 156 Ariz. 60, 64 (1988) (adding, to the statutory language, the fraudulent purpose element); see also A.R.S. § 13-2310. Courts broadly construe this statute to “cover all of the varieties [of fraud] made possible by boundless human ingenuity.” *State v. Haas*, 138 Ariz. 413, 424 (1983).

Parts of this crime would be easy to establish. A plan existed to sign and transmit false certificates, and the false electors, acting pursuant to that plan, made false representations (in representing through their signatures that they were the “duly elected” presidential electors of Arizona) and used false pretenses (that they were authorized to assign Arizona’s electoral votes to the Trump-Pence ticket). It is not necessary that any other person relied on the false representations. A.R.S. § 13-2310(B); accord *State v. Fierson*, 146 Ariz. 287, 291 (App. 1985).

As with the other statutes analyzed, the parts of this crime going to intent and knowledge could be more challenging to satisfy. The *mens rea* requirements for this statute are slightly lower than those that require intent to defraud. For this statute, the government “need not prove in every instance that the accused intended to defraud anyone,” but rather must prove that the purpose of the plan was to defraud others and that the defendant had knowledge of the plan’s fraudulent purpose when acting pursuant to the plan. *State v. Bridgeforth*, 156 Ariz. 60, 64 (1988). For purposes of this case, that would mean that the defendant knew the purpose of the plan was to deceive others into accepting the fake certificates as genuine, even if the defendant lacked that particular intent.

What makes it unclear whether this statute is a viable basis for prosecution, at least to some actors discussed in this memorandum, is the requirement that the defendant received a “benefit” as a result of their participation in the plan. “Benefit” is broadly defined as “anything of value or advantage, present or prospective.” A.R.S. § 13 105(3). The benefit need not be in the form of money or property, and courts have affirmed convictions resting on less tangible benefits. See, e.g., *State v. Henry*, 205 Ariz. 229, 235

(App. 2003) (holding that “sexual gratification” qualifies as a benefit); *State v. Griffin*, 250 Ariz. 651, 656 (App. 2021) (holding that by failing to register as a sex offender, the defendant “evaded the burdens of sex offender registration and thereby secured a benefit or advantage not enjoyed by other sex offender registrants”); *State v. Ward*, No. 1 CA-CR 18-0629, 2020 WL 948868, at *3 (Ariz. Ct. App. Feb. 27, 2020) (by forestalling the foreclosure process on a home, the defendant “obtained a benefit for his friends to live in the foreclosed home”) Moreover, because the benefit can be “prospective,” a scheme that enables the defendant to gain some benefit in the future is sufficient even if the benefit has not yet been obtained. *State v. Baker*, No. 1 CA-CR 21-0069, 2022 WL 16570927, at *2 (Ariz. Ct. App. Nov. 1, 2022); *Henry*, 205 Ariz. at 235. While benefit is defined broadly, the element must have some meaning, and we are not aware of case law defining the outer bounds of a qualifying benefit. *Henry*, 205 Ariz. at 235 (noting that the court “need not decide the maximum reach of § 13–2310 today”).

F. Conspiracy, A.R.S. § 13-1003

A person commits the crime of conspiracy if, “with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense.” A.R.S. § 13-1003(A). The elements of this crime are:

1. The defendant agreed with one or more persons that one of them or another person would engage in certain conduct,
2. The defendant intended to promote or assist in the commission of such conduct,
3. The intended conduct would constitute the crime charged, and the defendant knew that such conduct was a crime, AND
4. An overt act was committed in furtherance of such conduct.

RAJI (CRIMINAL) 5th 10.031.

From a prosecutor’s perspective, the benefit of a conspiracy charge is that it could apply to actors who agreed to the plan to create and submit the fake certificates, even if those actors did not directly participate in creating or submitting the fake certificates. The core of a conspiracy charge is the existence of an agreement, which can be proven through circumstantial evidence. *State v. Willoughby*, 181 Ariz. 530, 540 (1995). An agreement is a “common scheme or plan.” *State v. Allen*, 253 Ariz. 306, 311 (2022). Conspiracy does not require the underlying offense to have been completed, so long as at least one conspirator committed an overt act to further the conspiracy. *State v. Newman*, 141 Ariz. 554, 560 (1984). Another advantage of a conspiracy charge is that, so long as at least one conspirator committed an overt act in Arizona, the state would have jurisdiction over conspirators whose conduct occurred wholly outside Arizona. *State v. Chan*, 188 Ariz. 272, 274 (App. 1996).

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The element of “agreement” is shown, first, through the false electors’ and organizers’ participation in the scheme itself. Because conspiracies can “rarely, if ever” be proven by direct evidence of agreement—as the “secret conferences which inaugurate” the plan are generally not open to view of law enforcement—the existence of an agreement can be inferred from the “consequences or results” of the agreement and other “overt conduct of the parties.” *State v. Avila*, 147 Ariz. 330, 336 (1985). Here, the coordination necessary for a large group of people to work together to draft, sign, and transmit fake certificates implies the existence of an underlying plan. Accordingly, evidence that a person helped draft the language for the certificates, signed the certificates, or transmitted the certificates may be sufficient to infer their assent to a common scheme or plan. But here, there is also direct evidence of agreement to a common scheme, at least as to some of the participants, in emails and other messages concerning the plan. The element of each elector’s intent to “promote or assist” in the agreement is also shown by overt conduct—as evidenced, for example, by their signatures on the fake certificates, as well as the video of the signing in which all the electors assented to the text after it was read out loud.

The most challenging aspect of a conspiracy charge would be the third element, which requires that the intended conduct would constitute a crime *and* that the defendant knew the object of the conspiracy was criminal. As to the second part of this element, the object of the conspiracy could be any of the crimes previously discussed (e.g. forgery, criminal impersonation, or tampering with a public record). And then it would need to be shown that the defendant knew the conduct was a crime. The state need not prove that the defendants knew that their conduct violated any particular criminal statute. See RAJI (CRIMINAL) 5th 10.031 (noting that it “does not appear necessary under [the conspiracy statute] to prove that the defendant knew the statutory provision or intended to violate a specific law”). In general, ignorance of the law is no defense to criminal prosecution. *State v. Morse*, 127 Ariz. 25, 31 (1980). But the Arizona Supreme Court has held that, to convict for conspiracy, the agreement must have been “consciously criminal.” *State v. Gunnison*, 127 Ariz. 110, 113 (1980); see RAJI (CRIMINAL) 5th 10.031 (interpreting *Gunnison* to mean that “the defendant had to know that the underlying act of the conspiracy was a criminal act”). Thus, there must be evidence showing that the conspirators knew that the planned conduct was criminal. See RAJI (CRIMINAL) 5th 10.031.

In sum, and as further explored in the intent section below, the viability of conspiracy charges against any particular defendant will hinge primarily on evidence of that the defendant was aware that the object of the conspiracy was criminal. Further investigation would provide additional relevant evidence.

G. Intent and knowledge

Although the mens rea requirements for each of these statutes differ in some respects, nearly all of them have an element that requires that the defendant have some awareness (or deliberately avoided becoming aware) that the fake certificates were

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falsely purporting to be something that they were not or were going to be used in pursuit of a fraudulent scheme. Accordingly, under any of these statutes, the government will have to muster the same sort of evidence and make the same sort of factual showing to establish mens rea. We set forth the relevant standards and examine the relevant evidence from public sources below.

The crimes of forgery, tampering with a public record, and criminal impersonation all require an “intent to defraud.” Based on the currently available facts, under these statutes, proving intent to defraud would require showing that the false electors were purporting to be the genuine electors submitting genuine certificates when they knew they were not. By contrast, if the false electors believed that they were submitting alternate certificates that would be effective only if a court decision reversed Arizona’s election results, they might not have acted with intent to defraud.

Turning to conspiracy, although that statute does not necessarily require an intent to defraud, it does have a mens rea requirement that, for our purposes, is somewhat similar: that the agreement is “consciously criminal.” *State v. Gunnison*, 127 Ariz. 110, 113 (1980); see also RAJI (CRIMINAL) 5th 10.031 (interpreting *Gunnison* to mean that “the defendant had to know that the underlying act of the conspiracy was a criminal act”). None of this requires that the prosecution prove that any defendant had knowledge of what particular laws their conduct violated. But it does require evidence, direct or circumstantial, showing some awareness or belief that signing or submitting fake certificates was unlawful.

Presentment of a false instrument, which lacks an element requiring intent to defraud or conscious criminality, see *State v. Edgar*, 124 Ariz. 472, 474 (1979), could present a lower burden of proof. But that statute still requires knowledge that the written instrument purports to be genuine but is not. See *State v. Jones*, 222 Ariz. 555, 563 (App. 2009); *State v. Royer*, 150 Ariz. 501, 504 (App. 1986). This requirement, in the context of false electors, would seemingly require proof of knowledge that the fake certificates were not the valid submission of the lawful electors or a genuine “alternative” slate of electors.

Accordingly, evidence showing that the false electors or their co-conspirators knew that the fake certificates were not genuine or were otherwise improper documents purporting to be authentic certificates is helpful for all the above crimes.

Here, as discussed, there is circumstantial evidence that all the false electors intended to deceive because they all signed certificates that falsely stated that the false electors were the “duly elected” presidential electors of Arizona (when they were not) and falsely purported to cast Arizona’s electoral votes to the Trump-Pence ticket (when the false electors had no authority to do so). The election results, showing that this was not true, were widely known at that time. What follows is some analysis of direct evidence of various participants’ intent, based on currently available information, that either strengthens or complicates this circumstantial showing of fraudulent intent.

Wilenchik: Jack Wilenchik’s own words provide strong evidence that he knew the fake certificates were indeed fake. The best evidence in the public record is an email in which he expressly acknowledged that the votes were “fake” and that the votes would not be legal under federal law. Specifically, on December 8, 2020, in an email to Trump attorney Boris Epshteyn and others, Wilenchik wrote, “PS-I just talked to the gentleman who did that memo, Ken Chesebro. His idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (*even though the votes aren’t legal under federal law* — because they’re not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6th.... *We would just be sending in ‘fake’ electoral votes* to Pence so that ‘someone’ in Congress can make an objection when they start counting votes, and start arguing that the ‘fake’ votes should be counted.”¹²⁵ Moreover, in an email to Chesebro, Wilenchik agreed to file a petition for certiorari to the U.S. Supreme Court of *Ward v. Jackson* to give (in Wilenchik’s words) legal “cover” to the false electors.¹²⁶ That Wilenchik filed the petition for the improper purpose of giving the false electors legal “cover” underscores the *frivolity of the appeal, which in turn diminishes the argument that there was any pending litigation with any likelihood of success that (at least arguably) might warrant Republican electors signing the certificates as a contingency plan.* Wilenchik may argue, however, that the email shows that he believed that, so long as there was some pending litigation, the scheme was lawful.

Chesebro: As for Chesebro, the evolution of his legal memos offers some of the strongest evidence of his fraudulent intent. Chesebro could point to portions of his early legal memos that arguably support the notion that he believed (however wrongly) that an alternate slate of electors was not only legal, but prudent. In his November 18, 2020, memo, for example, he argued that because of precedent allegedly set during the 1960 Presidential election and a dispute about Hawaii’s electoral votes, the real deadline for choosing a slate of electors is January 6, 2021.¹²⁷ In this same memo, he admitted that it was “odd” for the Republican electors to cast their votes for Trump when he was behind in the vote and no certificate had been issued in his favor, but then wrote that a “fair reading of the federal statutes suggests that this is a reasonable course of action.”¹²⁸ He argued that doing so meant “a court decision (or, perhaps, a state legislative determination) rendered after December 14, 2020 in favor of the Trump-Pence slate of electors should be timely.”¹²⁹

However, in a subsequent memo, Chesebro’s justification for the fake certificates evolved from merely a contingency plan (in the event of a favorable judicial decision) to

¹²⁵ Haberman & Broadwater, *Fake Electors Plan*, *supra* note 2 (emphasis added).

¹²⁶ *Id.*

¹²⁷ Chesebro Nov. 18 Memo, at 2.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1.

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an effort to get Congress to accept the fake certificates (seemingly regardless of a judicial decision). In that memo, dated December 9, 2020, Chesebro wrote that the Republican electors should cast and transmit their votes “so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election.”¹³⁰ Moreover, in various emails Chesebro sent (including to Giuliani) in the days leading up to the casting of fake electoral votes on December 14, Chesebro made clear that the purpose of the scheme was to convince either Congress or Mike Pence that the fake certificates ought to be counted.¹³¹ Similarly, in Wilenchik’s December 8, 2020 email, Wilenchik wrote that he talked to Chesebro, who wanted Republicans in Arizona and other states to have their “electors send in their votes (even though the votes aren’t legal under federal law—because they’re not signed by the Governor); so that *members of Congress can fight about whether they should be counted* on January 6th.”¹³² In short, there is a strong case that, by the time that Chesebro provided Safsten and Wilenchik a draft certificate on December 10, 2020, Chesebro was furthering a plan that entailed an intent to defraud: a plan to convince Congress or Pence that the fake votes ought to be counted regardless of whether a court order gave them legal force.

Ward: As for Kelli Ward, at least according to what appears to be a third-hand account of a conversation she had with Giuliani, she acknowledged that casting the fake electoral votes could appear “treasonous,” suggesting she knew that they were not lawful, but also suggesting that she thought that pending litigation might insulate her from legal liability.¹³³ In a December 11, 2020, email to Wilenchik, Chesebro wrote that Ward had “spoken to the Mayor” and was “concerned it could appear treasonous for the AZ electors to vote on Monday if there is no pending court proceeding that might, eventually, lead to the electors being ratified as the legitimate ones.”¹³⁴

As with Wilenchik, Ward’s desire for a court case to be pending before signing the fake certificates could arguably cut either way on intent. But the better argument is that filing an appeal for the purpose of giving the scheme the appearance of being a contingency plan, which is what appears to have motivated the appeal, evinces consciousness of the illegality of the plan. Put another way, Ward needed the litigation so she could commit fraud. Ward also sought to keep the false electors process under wraps as a “surprise” to relevant officials and the media, evincing a desire for secrecy that could further evidence consciousness of illegality.¹³⁵ But Ward also made contemporaneous statements on the YouTube channel for the Arizona Republican Party and in media interviews that could be used to argue that she genuinely believed, albeit erroneously, that their actions were part of a legitimate contingency plan. For example, in a video on December 15, 2020—the day after the false electors signed the fake certificates—Kelli Ward incorrectly stated

¹³⁰ Chesebro Dec. 14 Memo, at 5 (emphasis added).

¹³¹ See Jan. 6th Comm. Report, at 343-45; Email from Chesebro to Giuliani, Dec. 13, 2020.

¹³² Haberman & Broadwater, *Fake Electors Plan*, *supra* note 2 (emphasis added).

¹³³ Haberman & Broadwater, *Treasonous*, *supra* note 81.

¹³⁴ *Id.*

¹³⁵ Haberman & Broadwater, *Fake Electors Plan*, *supra* note 2.

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that the false electors were the true electors and that there was precedent for their actions because there was pending litigation.¹³⁶

Like Chesebro, she essentially argued that the rightful winner was still in dispute, citing the 1960 presidential election and a dispute about electors in Hawaii.¹³⁷ Similarly, on a radio show on December 17, 2020, Ward stated that the Republican electors “represent the legally cast votes in our state” and that their goal was to have Trump “reinstated” as President on January 6, 2021, and then discussed her case pending before the Supreme Court and the example of the 1960 presidential election.¹³⁸ Further investigation, such as access to her text messages that she was ordered to submit to the January 6th Committee, could provide more direct evidence of Kelli Ward’s knowledge and intent.

Pellegrino and Lamon: In potential contrast, according to a news report, false elector Loraine Pellegrino stated that she signed the fake certificates, “in case there was a change in the decision here in the state,” adding “[t]hings were up in the air for a while.”¹³⁹ In a different news interview, false elector Jim Lamon stated that, “[t]he Republican electors put forth a valid document that said, in the event that the election certification was overturned, there would be no excuse not to recognize those electors.”¹⁴⁰ More investigation into communications among the false electors and the organizers will help reveal the extent of each person’s knowledge at the time of signing.

Others: As established in Section II of this memo, Trump campaign staff and advisers drove the scheme and propelled it forward in the key states, including Arizona. Trump himself sought and obtained Ronna McDaniel’s help in furtherance of the scheme. Accordingly, further investigation into the actions, intent, and knowledge of Trump, Giuliani, Eastman, Meadows, McDaniels, and others like Cleta Mitchell is warranted.¹⁴¹

¹³⁶ Arizona Republican Party, *AZGOP State of the Race Update (12/15/20)*, YOUTUBE (Dec. 15, 2020), <https://youtu.be/TIpJA5X2Bcc> 20.

¹³⁷ *Id.*

¹³⁸ Arizona Republican Party, *AZGOP Chairwoman Ward: Arizona Republican Electors “Represent the Legally Cast Votes in our State,”* YOUTUBE (Dec. 17, 2020), at 00:01:03, <https://www.youtube.com/watch?v=YnvVTATqkU8>.

¹³⁹ Richard Ruelas, *Arizona’s Trump supporters refuse to detail creation of an alternate slate of electors*, ARIZONA REPUBLIC (last updated Jan. 20, 2022, 6:06 PM), <https://www.azcentral.com/story/news/politics/elections/2022/01/13/arizona-trump-electors-slate-jake-hoffman-anthony-kern-kelli-ward/6519418001/>.

¹⁴⁰ Richard Ruelas, *US Senate candidate Jim Lamon explains why he falsely claimed to be an Arizona elector*, ARIZONA REPUBLIC (last updated Jan. 30, 2022, 7:54 PM), <https://www.azcentral.com/story/news/politics/arizona/2022/01/30/us-senate-candidate-jim-lamon-explains-false-trump-elector-claim/9280572002/>.

¹⁴¹ We discuss Trump and McDaniel elsewhere in this memo. Cleta Mitchell was significantly involved in the national scheme to overturn the results of the 2020 election, including by introducing John Eastman to Trump and participating in Trump’s call to the Georgia Secretary of State, Brad Raffensperger. We have not found public information directly linking Cleta Mitchell to Arizona and for that reason we include her in category 3. However, given her central role in the national scheme, more investigation is warranted. See Rosalind Helderman, *Trump campaign documents shows advisers knew fake-elector plan was baseless*,

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As to other false electors and participants in the scheme, the strength of a case against them may depend on additional evidence not currently in the public record. *See State v. Maxwell*, 95 Ariz. 396, 399 (1964) (holding that intent to defraud cannot be proved merely by the fact that the defendant signed a forged document). Ideally, such evidence would consist of private messages concerning the scheme obtained by investigators, public statements of the conspirators, or statements made to investigators during voluntary interviews about either their own knowledge or knowledge of other conspirators. Knowledge can be proved by circumstantial evidence, *see State v. Thompson*, 194 Ariz. 295, 298 (App. 1999), or by proof of deliberate ignorance, *see State v. Haas*, 138 Ariz. 413, 420 (1983); *State v. Fierro*, 220 Ariz. 337, 339 (App. 2008). As discussed, some circumstantial evidence of intent exists as to all participants in the scheme. Individualized evaluation of the knowledge of each false elector is critical, since their access to information and roles within the group apparently varied.¹⁴² Determinations about the strength of evidence of intent, circumstantial and direct, as to each participant in the scheme would best be made after more investigation.

Criminal Provisions in the Election Code

The Arizona election code contains numerous penal provisions for election-related crimes. These provisions apply equally to “any general, primary or special election” and as such, would include presidential elections. A.R.S. § 16-1001. However, due to constraints contained in the definitions of key terms or due to undefined terms, it appears that many of these provisions in the election code do not squarely apply to the circumstances herein. Moreover, because the conduct of the false electors and others involved in the scheme was unprecedented, the dearth of case law applying these provisions in similar circumstances is understandable. Further analysis of the potentially relevant election code crimes is available upon request.

IV. POTENTIAL DEFENSES

THE WASHINGTON POST (June 20, 2022), <https://www.washingtonpost.com/politics/2022/06/20/trump-documents-fake-electors-plan/>; *see also* Final Report of the Select Committee to Investigate the January 6th Attack on the U.S. Capitol, *Deposition of: Cleta Mitchell* (May 18, 2022), at 107, available at <https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000083769/pdf/GPO-J6-TRANSCRIPT-CTRL0000083769.pdf>; *see also* Jan. 6th Comm. Report, at 358-59.

¹⁴² As noted above, all 11 false electors participated in litigation challenging the election results. In addition, at the time, false elector Greg Safsten served as Executive Director for the Arizona Republican Party. False elector Jake Hoffman was an Arizona State Representative, and false elector Anthony Kern had served as a State Senator. Hoffman and Kern have refused to directly answer questions about their involvement in the false elector scheme. *See* Richard Ruelas, *Arizona’s Trump supporters refuse to detail creation of an alternate slate of electors*, ARIZONA REPUBLIC (last updated Jan. 20, 2022, 6:06 PM), <https://www.azcentral.com/story/news/politics/elections/2022/01/13/arizona-trump-electors-slate-jake-hoffman-anthony-kern-kelli-ward/6519418001/>; *see also* Dennis Welch, *Arizona’s ‘fake electors’ for Trump catch DOJ’s attention*, AZ FAMILY (July 18, 2023, 10:02 PM), <https://www.azfamily.com/2023/07/19/arizonas-fake-electors-trump-catch-dojs-attention/>.

A. Advice of Counsel

An advice-of-counsel defense seeks to disprove the mens rea element of an offense, showing that the defendant lacked the necessary “unlawful intent.” *United States v. Smith*, 7 F. App’x 772 (9th Cir. 2001). It is not likely to help the false electors. To start, it is “unclear” that any such defense even exists under Arizona law. *Arizona v. Workum*, No. 1 CA-CR 17-0306, 2020 WL 207058, at *5 n.7 (Ariz. Ct. App. 2020) (noting the court had “identified no Arizona case law on the subject, and, on its face, the theory appears contrary to our legislature’s decree that ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility”) (cleaned up).

Even if such a defense exists, prevailing on it is difficult. The false electors would have to introduce evidence of communications between themselves and any attorneys they consulted on the matter, which would require them to waive their attorney-client privilege. That could expose potentially inculpatory communications to the public and the prosecution, which might deter defendants from even invoking the defense. Moreover, to prevail on an advice-of-counsel defense, a defendant must introduce evidence that: “1) he placed all the relevant facts known to him before his counsel 2) counsel rendered an opinion on the propriety of a particular course of action 3) he believed that the opinion was rendered in good faith, and 4) in reasonable reliance upon that opinion he engaged in a course of action which corresponded with his counsel’s opinion.” *State v. Fendler*, 127 Ariz. 464, 477–78 (App. 1980) (noting that, while there exists no Arizona law on the subject, this standard is the “general rule” for the defense); see also *Workum*, 2020 WL 207058, at *5 n.7 (noting that, if the defense is available in Arizona, this is what it would require).

Nevertheless, based on what we know, some false electors may be able to present enough evidence to obtain a jury instruction on this defense (if the defense is recognized by the court). For example, we know that attorney Kenneth Chesebro emailed false elector Greg Safsten legal memos in which Chesebro cites the 1960 Kennedy-Nixon election as “historical precedent” for the scheme and concludes, while creating alternate slates of electors was “problematic” under the laws of certain states, that “voting by an alternate slate of electors is unproblematic in Arizona and Wisconsin.”¹⁴³ Conversely, the fact that even counsel for the Arizona Republican Party acknowledged the falsity and lack of lawfulness of the electors, in emails that have become public, casts doubt on the notion that the electors sought and secured legal advice assuring them of the legality of the scheme. Whether any such communications occurred between other false electors and attorneys, and thus whether this defense might succeed, might only be known if false electors were prosecuted and opted to raise this defense.

¹⁴³ See Email from Chesebro to Safsten, Dec. 11, 2020; Chesebro Dec. 14 Memo.

B. Good Faith Mistake of Fact or Law

Generally, neither ignorance nor mistake of a matter of fact relieves someone of criminal liability. A.R.S. § 13-204(A). But an exception exists when that mistake or ignorance of a fact “negates the culpable mental state required for commission of the offense.” *Id.* § 13-204(A)(1). In other words, while not an affirmative defense, a mistake of fact can be relevant to mens rea depending on the statute. Compare, *State v. Tarzian*, 136 Ariz. 238, 242 (App. 1983) (holding that an “honest belief in the truth of the statement” was a defense to a securities fraud statute), with *State v. Superior Ct. of Pima Cnty.*, 104 Ariz. 440, 443 (1969) (holding that a “good faith belief” that the victim was an adult is not a defense to statutory rape). With forgery, for example, a mistaken factual belief (such a belief that a check was not forged) can show that a defendant did not act with intent to defraud. See, e.g., *State v. Valdivia*, No. 1 CA-CR 16-0867, 2021 WL 1578157, at *4 (Ariz. Ct. App. Apr. 22, 2021) (holding that it was relevant whether the defendant “intended to defraud the bank when she gave them a forged check, or whether she unknowingly handed over the check after being duped by [a third party]”).

A mistake of law is less likely to (and generally will not) aid a defendant. The statute addressing this issue provides, without exception: “Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility.” A.R.S. § 13-204(B); accord *State v. Morse*, 127 Ariz. 25, 31 (1980) (holding that “ignorance . . . of the law which forbids the conduct with which one is charged is no defense”). There is nonetheless some nuance here. First, some statutes, even if they don’t require any knowledge of the specifics of the law, may still require some general belief or knowledge of illegality. As discussed, for example, conspiracy requires that the agreement was “consciously criminal.” *State v. Gunnison*, 127 Ariz. 110, 113 (1980).

Second, it is not always obvious whether a defendant’s mistake is one of fact or one of law. For instance, Arizona courts have held that, for Arizona’s law prohibiting felons from possessing firearms, a defendant’s belief that he was not a convicted felon was not a defense. See, e.g., *State v. Holmes*, 250 Ariz. 311, 316 (App. 2020). In those cases, the courts reasoned that this was a “mistake of law.” *Id.* In contrast, in a case interpreting the comparable federal statute, the U.S. Supreme Court held that the government did have to prove that the defendant “knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). The Court reasoned that while it is not a defense to be “unaware of the existence of a statute proscribing [the defendant’s] conduct,” it is a different matter when the defendant “has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct, thereby negating an element of the offense.” *Id.* at 2198 (cleaned up); see also *State v. Agee*, 181 Ariz. 58, 62 (App. 1994) (holding that, in prosecution for driving on a suspended license, the state had to prove that the defendant knew that his license was suspended). It appears that Arizona courts generally interpret what qualifies as a mistake of law (and is thus not a defense) more expansively than the Court in *Rehaif*. See, e.g., *State v. Woolbright*, No. 1 CA-CR 12-0680, 2014 WL 465655, at *3 (Ariz. Ct.

App. Feb. 4, 2014) (defining a “mistake of law” as “an erroneous conclusion as the legal effect of known fact”). Regardless, the larger takeaway is that the more that a defendant’s claimed error can be characterized as one of law than one of fact, the less likely the defendant will be able to argue it as a defense.

In sum, neither a mistake of fact nor a mistake of law gives someone a free pass to commit crimes. Nor are these doctrines the bases of affirmative defenses. But they may be the bases of defenses that, depending on the statute, are relevant to the state’s burden in proving intent. Put differently, so long as the state meets its burden on intent for a particular statute, neither of these doctrines will prevent a successful prosecution.

C. Reliance on historical precedent from the 1960 election in Hawaii

The false electors are likely to assert “ongoing litigation” as a reason that their conduct did not violate the law. They will almost certainly point to the 1960 Presidential Election results in Hawaii as that instance is specifically cited by one of the architects of the false electors scheme, Kenneth Chesebro, in his December 9, 2020 memo.

On Election Day 1960, the presidential contest in Hawaii was extremely close—a 140 vote margin in favor of then-Vice President and Republican candidate Richard Nixon. When the Electoral College meeting date, December 19, arrived, the state was amid a court-ordered recount. Although the acting governor of Hawaii had previously issued a Certificate of Ascertainment for the Nixon electors, Hawaii’s Democratic presidential electors met on December 19, minutes after the Republican presidential electors met to cast their votes in favor of John F. Kennedy, the Democratic candidate. This resulted in competing slates of electors. On January 4, 1961, after the recount was complete and victory was re-certified in Kennedy’s favor, the results, including a new Certificate of Ascertainment issued by the governor, were sent to Congress and Hawaii’s electors were awarded to Kennedy. Although Chesebro’s memo focuses on the Hawaii “precedent,” the situations in 1960 and 2020 were different in important ways.

1. Hawaii 1960

In Hawaii, Democrats sought a recount in the extremely close presidential race after questions were raised about the tallies. On December 13, the “safe harbor” deadline (but before the statutory deadline for the electors to vote), a Hawaii state court ordered a recount.¹⁴⁴ On December 18, the day when the Electoral College was set to meet in their

¹⁴⁴ *Hawaii is Recounting*, THE NEW YORK TIMES (Dec. 14, 1960), (including in appendix to this memorandum); see also Michael L. Rosin & Jason Harrow, *How To Decide A Very Close Election For Presidential Electors: Part 2*, TAKE CARE BLOG (Oct. 23, 2020), <https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2>.

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respective states, the recount was about one fourth complete and showed Kennedy with a narrow advantage.¹⁴⁵

That day, both the Democratic and Republican slates of electors cast electoral votes for their respective candidates, thus creating one official and one contingent certificate of electoral votes.¹⁴⁶ The Democrats went through this process to ensure that a potential eventual victory (pursuant to the ongoing recount) would be countable, given the deadlines outlined in the ECA. Indeed, when the Kennedy electors met, they explicitly stated they were doing so because there was an active recount and they stated that their votes were entirely conditional: They were voting as “a safeguard,” their attorney said.¹⁴⁷ After they voted, their attorney went to the Lt. Gov’s office and presented him with a copy of their certificates and explained what they were.¹⁴⁸

By December 28, the recount was complete and showed Kennedy ahead.¹⁴⁹ On January 4, 1961, the governor signed a revised Certificate of Ascertainment in favor of Kennedy, which was immediately mailed to Congress.¹⁵⁰

On January 6, 1961, the President of the Senate (and then-Vice President) Nixon presided over the opening of electoral votes before a joint session of Congress.¹⁵¹ Notably, by this time, it was clear that Kennedy won the election, with or without Hawaii’s electoral votes.¹⁵² When it came time to open and count Hawaii’s votes, Nixon said “In order not to delay the further count of the electoral vote here, the Chair, *without the intent of establishing a precedent*, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii. If there be no objection in this joint convention, the Chair will instruct the tellers-and he now does-to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961-those votes having been cast for John F. Kennedy, of Massachusetts, for President and LYNDON B. JOHNSON, of

¹⁴⁵ Associated Press, *Kennedy Widens Lead: Margin in Recount in Hawaii is Increased to 55*, THE NEW YORK TIMES, (Dec. 18, 1960), https://timesmachine.nytimes.com/timesmachine/1960/12/19/99830831.pdf?pdf_redirect=true&ip=0; see also Rosin & Harrow, *How to Decide*, *supra* note 146.

¹⁴⁶ Burl Burlingame, *Hawaii was the ‘Florida’ of the 1960 election*, HONOLULU STAR BULLETIN (Nov. 18, 2000), <https://archives.starbulletin.com/2000/11/18/editorial/special.html>.

¹⁴⁷ Forrest Black, *Elder Statesmen Cast Two Sets of Electoral Votes for Isles*, HONOLULU STAR BULLETIN (Dec. 19, 1960), (included in appendix to this memorandum).

¹⁴⁸ *Id.*

¹⁴⁹ *Kennedy Wins Hawaii, Recount gives him 115-Vote Victory, Court Rules*, THE NEW YORK TIMES (Dec. 28, 1960),

https://timesmachine.nytimes.com/timesmachine/1960/12/29/99906321.pdf?pdf_redirect=true&ip=0; see also *Hawaii is Recounting*, THE NEW YORK TIMES (Dec. 14, 1960), (included in appendix to this memorandum); see also Rosin & Harrow, *How to Decide*, *supra* note 146.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Burlingame, *Hawaii was the ‘Florida’*, *supra*, note 148.

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Texas, for Vice President” (emphasis added).¹⁵³ There was no objection, and the Hawaii electoral votes were counted in Kennedy’s favor.¹⁵⁴

2. Arizona 2020

The situation on December 14, 2020, when the false electors met in Arizona, was markedly different from Hawaii in 1960. First, when the false electors met, Biden had already been declared the winner, the election had been certified by the Secretary of State in his favor (on November 30), and he was in the lead by 10,457 votes. The margin of victory here was in stark contrast to the 171 razor-thin margin that separated the presidential race in Hawaii in 1960. Second, there was no pending court-ordered recount in 2020. There was no uncertainty about the election results. In fact, statutorily required limited hand counts in multiple counties, including Maricopa, had been completed, and they revealed no fraud or other material issue that might give rise to uncertainty.¹⁵⁵ Third, the pending petition for a writ of certiorari to the U.S. Supreme Court in *Ward v. Jackson*,¹⁵⁶ which was filed explicitly to give cover to the false electors, did not alter the fact that Arizona’s electors were arguably within the safe harbor.¹⁵⁷ Finally, Governor Ducey did not sign a revised certificate of ascertainment in favor of the false electors.¹⁵⁸ Quite the contrary. On January 4, 2021, he sent a Certificate of Final Determination to the Archivist noting that the Arizona Supreme Court had made a final determination as to all cases or controversies regarding the electors.¹⁵⁹

¹⁵³ Rosin & Harrow, *How to Decide*, *supra*, note 146.

¹⁵⁴ *Id.*

¹⁵⁵ Arizona Secretary of State, *2020 General Election Hand Count Results*, <https://azsos.gov/2020-general-election-hand-count-results> (last visited July 18, 2020); *see also* Jen Fifield, *Maricopa County Board of Supervisors votes unanimously to certify election results*, *ARIZONA REPUBLIC* (Nov. 20, 2020), <https://www.azcentral.com/story/news/politics/elections/2020/11/20/maricopa-county-supervisors-meet-consider-certifying-election-results/6362991002/>.

¹⁵⁶ *See* Supreme Court of the United States, Docket No. 20-809, https://www.supremecourt.gov/DocketPDF/20/20-809/163521/20201211121556721_12-11-20%20Pet%20for%20Writ%20Ward%20v%20Jackson.pdf; *see also* Haberman & Broadwater, *Treasonous*, *supra* note 81.

¹⁵⁷ The safe harbor provision stated that electoral slates are “conclusive” if: one, a state has provided by law for a “final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures;” and, two, if that final determination is made six days before the electors are set to meet. 3 U.S.C. § 5 (2020). In Arizona, the state Supreme Court ended the contest on December 8—the “safe harbor” date. The fact that the case was later appealed to the U.S. Supreme Court does not alter the fact that under the terms of the ECA and state law, the contest had been finally determined. There were to be sure other cases still pending after December 8, but we believe they did not represent ongoing controversies or contests within the meaning of 3 U.S.C. § 5.

¹⁵⁸ *Arizona Certificate of Ascertainment 2020* (Nov. 3, 2020), <https://www.archives.gov/files/ascertainment-arizona.pdf>.

¹⁵⁹ *Id.*

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The facts on the ground and legal posture in Arizona in December and January of 2020-2021 are not analogous to those in 1960.¹⁶⁰ Any plausible argument that there was a true question about the winner is undermined by the sheer number of votes that separated Biden and Trump. Recounts very rarely change the outcome of an election, and when they do¹⁶¹ the original margin of votes is exceedingly small—in the tens or low hundreds, not tens of thousands.¹⁶²

Thus, while the false electors may cite “ongoing litigation” as a potential defense, it should not form a reasonable basis for a defense to prosecution for those false electors who otherwise satisfy all the elements of the crime.

V. STATUTES OF LIMITATIONS AND OTHER TIMING CONSIDERATIONS

Statutes of limitations will not provide a barrier to prosecution, so long as the prosecution is brought within the next four years. Generally, for crimes classified as class 2 through class 6 felonies, the statute of limitations is seven years. A.R.S. § 13-107(B)(1). The criminal code statutes discussed in this memorandum are class 2 through class 6 felonies. *See* A.R.S. § 13-2002(C) (forgery generally a class 4 felony); A.R.S. § 13-2407(C) (tampering with a public record a class 6 felony); A.R.S. § 13-2006 (criminal impersonation a class 6 felony); A.R.S. § 39-161 (presentment of false instrument for filing a class 6 felony); A.R.S. § 13-2310(A) (fraudulent schemes and artifices a class 2 felony); A.R.S. § 13-1003(D) (conspiracy the same class as the most serious offense that is object of conspiracy). Thus, the statute of limitations for these offenses, with one probable exception, is seven years. The probable exception is tampering with a public record, which likely has no limitations period at all. *See* A.R.S. § 13-107(A) (providing that the prosecution of certain offenses, including “a felony involving falsification of public records,” may be commenced at any time).¹⁶³ In any event, the relevant statutes of limitations will not bar a timely prosecution.¹⁶⁴

¹⁶⁰ *See, e.g.*, Ed Kilgore, *The Flimsy Nixon Precedent Trump is Seizing On to Contest Biden’s Win*, NEW YORK MAGAZINE INTELLIGENCER (Dec. 29, 2020), <https://nymag.com/intelligencer/2020/12/the-nixon-precedent-trump-will-cite-to-contest-bidens-win.html>; Rosin & Harrow, *How To Decide*, *supra* note 146.

¹⁶¹ Hope Ford, *The times a recount actually changed the election results*, 11 ALIVE (Nov. 12, 2018), <https://www.11alive.com/article/news/the-times-a-recount-actually-changed-the-election-results/85-76a6031e-aa95-4e1d-9d55-b7dc66596a49>.

¹⁶² *See* Fair Vote, *Election Recounts Rarely Change the Outcome* (Nov. 4, 2020), https://fairvote.org/election_recounts_rarely_change_the_outcome/.

¹⁶³ The only case we are aware of interpreting this public-records exception to the statute of limitations held that, because statutes of limitations must be construed in favor the accused, that the public-records exception applied to a statute prohibiting falsification of public records but did not apply to a statute prohibiting offering a forged document for filing in a public office. *State v. Fogel*, 16 Ariz. App. 246, at 248–49 (1972). Accordingly, it is unlikely that the other offenses we discuss beyond tampering with a public record qualify for this exception.

¹⁶⁴ There is one narrow exception to this statement: the crime of solicitation, which this memorandum briefly addresses, could have a shorter statute of limitations depending on the underlying offense.

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Nor should concerns about timing—given that several years have elapsed since the scheme—preclude prosecution now. Thorough investigations of complex cases take time. Other state and federal authorities are continuing to investigate the fake elector schemes and, only Michigan has brought charges thus far, and that was very recently in July 2023. Moreover, in the time since the culmination of the scheme on January 6, new information has continued to come to light, including in the January 6th Committee’s Report, released to the public in December 2022. In addition, the voters of the State of Arizona elected a new Attorney General who took office in January 2023. Under these facts, the investigation has been diligent, without undue delay. In short, neither legal nor prudential considerations would make a prosecution improper.

VI. CONCLUSION

On January 6, 2021, our democratic institutions hung in the balance as the Capitol and democracy itself were under attack. The individuals who conspired to execute the false elector scheme acted in furtherance of and perpetuated a dangerous attack on our democratic process that could have upended the will of millions of voters. Even though they were unsuccessful in overturning the election results, their actions caused grave harm. Indeed, for the first time in American history, the peaceful transfer of power was disrupted. Investigation and, if factually and legally supported, prosecution are critical steps to ensuring that those who violated the criminal laws are held accountable and that others are deterred from carrying out similar violations in the future.

Solicitation is generally a lesser offense than the underlying offense. *See* A.R.S. § 13-1002(B). Solicitation of class 6 felonies (such as criminal impersonation and presentment of a false instrument for filing) is a misdemeanor, *id.*, and misdemeanors carry of statute of limitations of one year, A.R.S. 13-107(B)(2).

APPENDIX

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Honolulu Star-Bulletin

Small text in top right corner, likely publication details or subscription information.

Monday, December 27, 1954. HONOLULU, HAWAII, 1954. PRICE 10 CENTS. HOME EDITION 10 CENTS.

High Waves Pound North Shore of Isles



Several thousand people gathered on the beach to watch the high waves pound the shore of the islands.

UN Congo Policy Indorsement Fails

Several hundred delegates to the United Nations General Assembly today voted to reject a resolution which would have indorsed the Congo's independence.

Several Flee Oahu Homes; No One Hurt

Several people fled their homes on Oahu today as high waves pounded the shore, but no one was hurt.

City Sent \$1,261 Bill For Tarbell's Legal Aid

The City of Honolulu today sent a bill for \$1,261 to the State Department of Public Safety for legal aid provided to the late Senator John A. Burns.

Elder Statesmen Cast Two Sets Of Electoral Votes for Isles

Two sets of electoral votes for the islands were cast today by the elder statesmen of the United States.

Passenger's Transistor Radio Hinted Cause of Mid-Air Crash

The cause of a mid-air crash today was hinted by a passenger's transistor radio.

Discoverer Goes After Ray Data

The discoverer of the Ray data is going after it.

Kennedy Wins - Officially

John F. Kennedy has won the election, officially.



Small text next to the portrait of Kennedy.

Dog Race Push In Isles Forecast

A dog race push is forecast for the islands.

Transistor Radio 'Could Cause' Malfunction of Navigation Gear

A transistor radio could cause a malfunction of navigation gear.

Yule Fund Tops Goal, But Larder Not Filled

The Yule fund has topped its goal, but the larder is not filled.

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A transistor radio could cause a malfunction of navigation gear.

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Yule Fund Tops Goal, But Larder Not Filled

The Yule fund has topped its goal, but the larder is not filled.

Hawaii Is Recounting

Special to The New York Times.

HONOLULU, Dec. 14—Circuit Judge Ronald B. Jamieson refused today to postpone a recount of election returns from thirty-four Hawaii precincts despite Republican protests that it would serve no useful purpose.

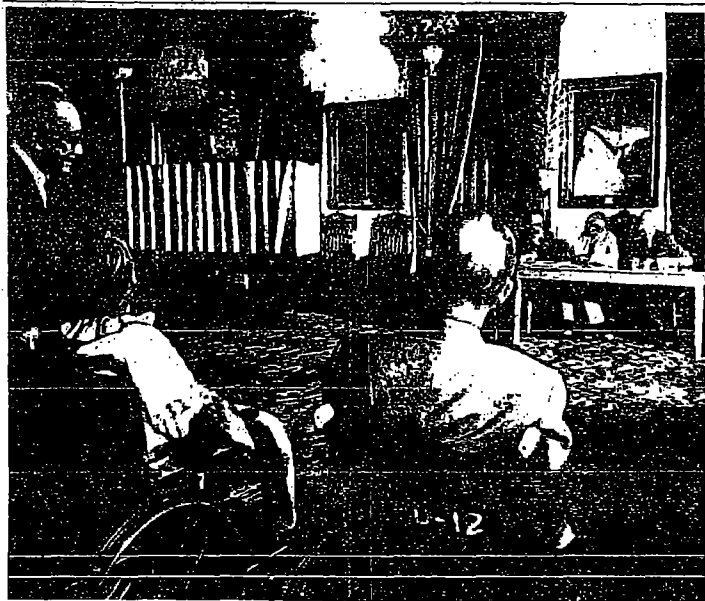
Judge Jamieson ordered the recount started Tuesday night. Twelve of the thirty-four contested precincts were retallied and Mr. Kennedy gained only one more vote. Mr. Nixon officially was declared the winner of Hawaii's three electoral votes on the basis of a 141-vote margin.

The State Attorney General tried to end the recount today on the ground that a Federal statute required a decision on disputed election results at least six days before the Presidential electors were to meet. They meet Monday.

The New York Times

Published: December 15, 1960

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Democratic electors William Heen and Aunt Jennie Wilson and Delbert Metzger (both in wheel chairs) wait their turn to cast votes for Kennedy as Republicans vote for Nixon across the room.—Star-Bulletin

Elder Statesmen Cast Two Sets Of Electoral Votes for Isles

By FORREST BLACK
The elder statesmen of the Republican and Democratic Parties of Hawaii met in historic Iolani Palace yesterday and cast Hawaii's three electoral votes for President

twice.
Three Republican electors—J. Howard Worrall, Gavien A. Bush and O. P. Soares—gave three official electoral votes to Vice-President Nixon.

Three Democratic electors—Aunt Jennie Wilson, Delbert A. Metzger and William H. Heen—voted unofficially for President-Elect John F. Kennedy.

Under an oil painting of Queen Kalama in the royal Throne Room, the Republicans voted for Nixon in red, white and blue voting booths and then certified their votes.

The G.O.P. ceremony last-

ed from 2 p.m. to 2:45 p.m., starting at 2 p.m., Governor William F. Quinn presented the Republicans with documents certifying that Nixon had won Hawaii by 141 votes, 92,505 to Kennedy's 92,384, on the Waikiki side of the Throne Room.

The ceremony lasted from 2:45 p.m. to 3:15 p.m.

The Democratic ballots and certificates were not official, and the Republican votes were.

Prior to the ceremony

and that they were legally elected the State's electors. The Democrats had no official credentials showing Kennedy won in Hawaii.

When the Democrats

voted, a court-ordered State-

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